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THE BONSOR AFFAIR: A POST-SCRIPT

THE decision of the House of Lords in *Bonsor* v. *Musicians' Union* [1] has already been analysed by Professor Lloyd [2] and Mr. Thomas.[3] The purpose of this note is to add a post-script to their discussion,[4] and to investigate further some of the matters which may arise from the case. Briefly, the issue which their Lordships had to decide was whether the plaintiff member, expelled from the union in breach of the rules, could recover damages against the "union" for breach of contract.[5] Bonsor's name had been erased from the lists by the Brighton branch secretary because his subscriptions were fifty-two weeks in arrears [6]; as the rules stood, only the branch committee could take that decision; and the Court of Appeal [7] granted, in consequence, a declaration and injunction which were not challenged on appeal. But expulsion from the union (which was "what is known as 'a closed shop'" [8]) was the equivalent

[1] [1956] A.C. 104.
[2] "Damages for Wrongful Expulsion from a Trade Union" (1956) 19 M.L.R. 121.
[3] "Trade Unions and Their Members" (1956) C.L.J. 67.
[4] Accordingly, many of the matters set out fully in their articles are not repeated here.
[5] Such was the claim, although it was never pleaded as such; *per* Lord MacDermott, p. 134. (Compare *Abbott* v. *Sullivan* [1952] 1 K.B. 189, 196.)
[6] If the Rules had provided for termination of membership *ipso facto* the case would never have arisen: *cf.* [1954] Ch. 483, Evershed M.R. The subscriptions were, of course, not recoverable by action: Trade Union Act, 1871, s. 4 (2). It was conceded in the House of Lords ("rightly" *per* Lord MacDermott; Lord Keith agreed), that s. 4 did not bar the action for damages. The section probably does not stop the member from bringing an action designed to prevent the Union from refusing to *receive* his subscriptions (so that it may then expel him for arrears): *Brodie* v. *Bevan* (1921) 38 T.L.R. 172, 177.
[7] [1954] Ch. 479. Denning L.J. there put forward the novel suggestion that no rule would be enforced which was "contrary to what is fair and reasonable": p. 486. This extension of the rules of public policy to curtail freedom of (so-called) contract, may not be unreasonable; but it is suggested that Mr. Thomas's summary shows how novel this principle would be: *op. cit.*, pp. 78–79. For the conflicting dicta, see Lloyd, "Disciplinary Powers of Professional Bodies" (1950) 13 M.L.R. 281, 302–303.
[8] Lord MacDermott, p. 132.

for Bonsor of a "sentence of industrial death."[9] The facts of the case make a strong appeal to one's sympathy, and in more than one quarter the decision to award damages has been hailed as "a useful blow in favour of individual freedom"[10]; but sympathy and the quest for justice can produce law difficult to interpret and to defend, and *Bonsor's* case may have done both these things. At first sight, four of their Lordships are divided equally on the essential question whether the union is or is not a "legal entity,"[11] leaving the commentators to do battle for the fifth voice, that of Lord Keith.[12] It would, indeed, be unfortunate if doubt were the main legacy of the most important case on trade unions for many years. The object of the criticisms offered below is simply to assist in the investigation of some of the factors which may influence the judges, or, more immediately, the legal advisers of the unions, who, in interpreting their Lordships' speeches, will have to reach a firm decision as to the meaning of *Bonsor's* case. It will be suggested—

(i) that the view, advanced principally by Lord MacDermott,[13] that the Trade Union Acts, 1871 and 1876, did not intend to make the registered union a legal entity, carries, on reconsideration, greater force than the opposite view put by Lord Morton and Lord Porter;

(ii) that Lord MacDermott's view, however, might well have led logically to the conclusion that Bonsor could not recover damages from the unincorporated "union";

(iii) that Lord MacDermott, in finding a way out of this difficulty, does not, in fact, adhere strictly to the analysis of "wholly unincorporated body"; that in this variation at a critical point must lie the explanation of his Lordship's speech; and that it is not easy to interpret either his or Lord Keith's speech without giving the union some "capacities" and "existence" apart from its members;

[9] Coleridge J. in *Blackall* v. *National Union of Foundrymen* (1923) 39 T.L.R. 431, 432. For another example of the great power possessed by the unions, see their exclusive right to report "disputes" under the Industrial Disputes Order, 1951, Art. 1 (iii), discussed in Professor Kahn-Freund's stimulating Chapter 2 of Flanders and Clegg (ed.), *The System of Industrial Relations in Great Britain*, p. 95.

[10] Prof. Lloyd, *op. cit.*, p. 134.

[11] Lord Morton and Lord Porter in favour; Lord MacDermott and Lord Somervell against.

[12] His Lordship thought that the union's characteristics "may entitle it to be called a legal entity, while at the same time remaining an unincorporated association of individuals" (p. 150). See the different interpretations already placed upon his speech in [1956] A.C. 104, and [1955] 3 All E.R. 518 (headnotes). Mr. Thomas, *op. cit.*, p. 75, agrees with the *Law Reports*. Prof. Lloyd, *op. cit.*, p. 130, places Lord Keith in an "intermediate position"; but one may respectfully agree with his comment that Lord Keith's view is "not easy to follow."

[13] Lord Somervell agrees, p. 158, and takes a view generally akin to that of Lord MacDermott. But Lord Somervell does not deal expressly with the matters discussed in the third part of this note.

(iv) that the minimum "capacity" which suffices to take their Lordships to their conclusion is so similar to the capacity to contract that it is not profitable to distinguish between them; and that *Bonsor's* case, therefore, must be understood to have brought to a climax the long series of judicial attempts to read into the Acts as much of a "corporate character" as possible, and to have produced a situation as unsettled as that existing in 1901 and 1910.[14]

Before investigating the case, it must be said that the analysis which follows is directed partly to the meaning of the Acts, but more particularly to the concepts employed and developed in their Lordships' speeches. The latter approach may be dubbed old-fashioned by those who are concerned more with the social problem involved in the situation, and who, having no objection to the supreme tribunal "making law" to meet new demands, as it often must, feel that the demand was here so insistent that a refusal to award damages would have been unthinkable. Indeed, it is idle to suppose that, in an area in which social conflict has been so acute, policy can be far removed from anyone's mind. But policy does not always determine cases, and judges have on occasion, perhaps to a fault, faced charges of timorousness with fortitude. Where the principles to be applied form part of a "settlement" enacted for problems the common law could not or would not solve, judicial interpretation savouring of novelty has its dangers. Nor is social purpose the context in which future judges will necessarily, or expressly, interpret *Bonsor's* case, and it is not suggested that it was the basis of their Lordships' speeches. But those who wish to justify the case on these grounds must be prepared to discuss wider legislation, and such discussion would be opportune. The position of trade unions is not and cannot be satisfactory when they are governed by an out-moded set of peculiar rules, the accidents of industrial strife. But those rules

[14] The years of *Taff Vale Ry. Co.* v. *Amal. Soc. of Ry. Servants* [1901] A.C. 426, and *Amal. Soc. of Ry. Servants* v. *Osborne* [1910] A.C. 87 which gave rise respectively to the Trade Disputes Act, 1906, and the Trade Union Act, 1913. (Other cases in which the registered union has been held to bear corporate characteristics include *Cotter* v. *Nat. Union of Seamen* [1929] 2 Ch. 58, and *N.U.G.M.W.* v. *Gillian* [1946] K.B. 81; but it will be suggested that none of the previous cases attached a capacity to be party to a contract, unless that was the intention of Lush J. in *Holland* v. *London Soc. of Compositors* (1924) 40 T.L.R. 440, and various dicta in *Gillian's* case. The "declaration and injunction" cases do not go that far.) It is worthy of notice that the serious view taken by the unions of the issues raised in the *Bonsor* appeal was illustrated by the T.U.C.'s undertaking to bear the union's legal costs in it, because the case involved "principles of vital interest to the Trade Union Movement": General Council Report, 1955, T.U.C. Congress Report, p. 306. The General Council now regard the decision as "an important change in the law" (para. 437, 1956 Report). Counsel, who agreed with their view, advised them against all of the many possible escape routes from the decision, some of which are discussed below. The Council decided to await the decision on the amount of damages in the *Bonsor* case before taking a decision on further action (*ibid.*). See *infra*, n. 74a.

are not susceptible of profitable alteration unless the whole structure be revised.

THE UNION A LEGAL ENTITY?

Whether or not the Musicians' Union was a "legal entity" was, it will be recalled, critical because around the answer turned another question: Who were the parties to the contract of membership? [15] Only the Acts could have incorporated the registered unions, and Lord MacDermott's demonstration that no such intention can be found in them is, it is submitted, convincing.[16] He cites, *inter alia*, the "comparative ease with which the garb of registration may be donned and doffed," [17] the need for trustees to hold, and to appear in suits concerning, union property,[18] the application of sections such as section 4 of the 1871 Act to all unions registered or not,[19] and, most important, the absence of any express indication of incorporation on the part of a legislature which was, after the Companies Act, 1862, plainly not ignorant of the "recognised and usual way of conferring upon an association of persons the status of a distinct legal entity," and which used as a model part of the 1862 statute in a manner which "studiously avoids a familiar and appropriate method without purporting to adopt another in its stead." [20] After the *Taff Vale* case, the Act must be understood to have attached to the registered union certain *procedural* characteristics usually found only in juristic persons, including the power to sue and be sued in the registered name, the ability in such suit to stand for all members, past and present (whatever their personal capacities and peculiarities), and the liability to have judgments enforced against the common fund.[21]

[15] The views on the nature of the contract were largely determined by the status ascribed to the union: see, *e.g.*, Lord Porter, p. 129; Lord MacDermott, p. 134; Lord Somervell, p. 157.

[16] Lord Somervell agreed, p. 158.

[17] p. 144. See especially ss. 6 and 13 of the 1871 Act, and s. 8 of the 1876 Act. It has usually been thought that the advantages of registration are "not of very considerable importance, and no great inconvenience is caused by failing to register": Citrine, *Trade Union Law*, p. 120; but this view may now need reconsideration.

[18] pp. 136–137; see especially ss. 7, 8 and 9 of the 1871 Act. Lord Somervell's concern on this point is indicated by his opinion that trustees should be parties to the action for damages, p. 157. Compare Evershed M.R. [1954] Ch. 505; *Howden* v. *Yorkshire Miners' Assocn.* [1903] 1 K.B. 308, 323; and *Taff Vale* [1901] 1 K.B. 170, 176 (the unanimous judgment of the C.A. later reversed to which Lord MacDermott's analysis sends one back with interest); *Ideal Films, Ltd.* v. *Richards* [1927] 1 K.B. 374.

[19] pp. 135–136. This consideration also prevents s. 4 (4) from supporting the opposite argument. *Cf. McLuskey* v. *Cole* [1922] 1 Ch. 7 (C.A.); *Holland* v. *London Soc. of Compositors* (1924) 40 T.L.R. 440.

[20] p. 144: and "the only reference to a seal is in relation to the work of the registry." The dicta cited by Lord MacDermott, pp. 139–143, Lord Keith, pp. 150–152, and Lord Somervell, p. 155, all point in the same direction. They need not be enumerated here, but they more than balance the dicta interpreted in the opposite sense by Lord Morton and Lord Porter on which comment is made later.

[21] See especially pp. 144–146, where Lord MacDermott comments upon the well-known dictum of Lord Lindley in *Wise* v. *Perpetual Trustee Co., Ltd.*

It is difficult not to agree with Professor Lloyd's comment that the last two of these qualities involve questions not merely of procedure but, also, of substantive law.[22] But the implied criticism that Lord MacDermott ought, therefore, to have changed his construction of the Acts is less acceptable; the reasoning suggests rather that the *Taff Vale* case went too far than that Lord MacDermott might have gone further. Nor is it really the case that Lord MacDermott refused to accept any possibility of an "intermediate semi-corporate status."[23] His approach is to insist that the union is shaped solely by the Acts. He makes use of no *a priori* notions, nor of any presumption which demands that, once some corporate qualities are discovered, the group is to be, as Professor Lloyd suggests, "treated as if it were a corporate entity for all purposes save in such respects as are expressly excluded or restricted by the terms of the Act itself."[24] Even if it were not clear that the Acts of 1871 and 1876 themselves precluded such an approach, the courts, it will be suggested later, have not previously treated statutory creations in this manner.

It is, indeed, arguable that the charge of refusing to accept a semi-corporate status could be made against Lord Morton and Lord Porter rather than against Lord MacDermott. Both, it is true, protest that they are not designating the registered union a "corporation." It is only a "thing created by statute, call it what you will, an entity, a body, a near-corporation, which by statute has in certain respects an existence apart from its members" but which may well "not possess the full powers of an incorporated society."[25] Again, the "respondent union, though it is *not* an incorporated body, is capable of entering into contracts."[26] Because of the other marks of corporateness imprinted (impliedly) by the Act, both bestow upon it the capacity to contract. But it has been said that "Contractual liability is the touchstone of associations."[27] Certainly, it is a good touchstone for the usage of the word "corporation" when the relevant Act has deprived us of the test of "capacity to hold property" by expressly vesting the property in trustees. When they go this far, their Lordships are surely into the country of "corporations" if the boundaries are to have any convenient and recognisable definition. Nor is it easy to see why they should, on their own premises, protest

[1903] A.C. 139, 149, which he prefers not to adopt as the basis of his conclusion that liability attaches to the common fund, rather than the personal assets of the members.

22 *Op. cit.*, pp. 129–130. But the division between the two is not sacrosanct, and the Act could undoubtedly have created an "improved type" of representative action and no more.

23 Prof. Lloyd, *op. cit.*, p. 128.

24 *Ibid.* This is a not unfair description of the attitude of Lord Morton and Lord Porter.

25 Lord Porter, p. 131.

26 Lord Morton, p. 127 (italics supplied).

27 Carr, *Law of Corporations*, p. 6 (1905). For a similar argument to that advanced, see Prof. Lloyd, *op. cit.*, p. 127. *Cf.* Jenkins L.J. [1954] Ch. 524.

so much that the union is not deserving of the full title. And there is little to be gained from terms such as "near" or "quasi" corporation if the extent of the proximity is not made plain. More, if "corporation" is itself only a word that imports "analogy" and "shift of meaning" rather than a "thing" whose "real nature" can be investigated,[28] words such as "quasi-corporation" are doubly inconvenient, since they at most pile one "as if" upon another and introduce an analogy with an analogy. Again, if it is true that "Parliament has recently shown an increasing fondness for creating quasi-corporations,"[29] the legislature has undoubtedly had grounds for protecting its creations from the full analogy with individuals, and the courts should be acute to preserve, rather than to destroy, the difference between such groups and fully corporate bodies.

Their Lordships support their conclusion mainly by dicta from the "declaration and injunction" cases,[30] *Osborne's* case,[31] *Gillian's* case,[32] and the *Taff Vale* case,[33] on which they place most reliance but in which their Lordships' views are thought by Lord MacDermott to have been shared by Lord Brampton alone.[34] It is not easy to see how their Lordships found in the

[28] See Prof. H. L. A. Hart, *Definition and Theory in Jurisprudence*, pp. 23, 27; (1954) 70 L.Q.R. 37, 55, 59.

[29] Roxburgh J. in *I. R. C.* v. *Bew Estates, Ltd.* [1956] Ch. 407, 415, where he held that the War Damage Commission was such a body.

[30] *e.g.*, *Braithwaite's Case* [1922] 2 A.C. 440, a "decisive" case for Lord Morton (p. 126). These cases do not deal directly with capacity to be party to a contract; nor do the decisions to grant a declaration or injunction demand the explanation that the union was a party to any of the contracts broken by wrongful expulsion. They furthermore contain judgments and dicta which appear to support Lord MacDermott: *e.g.*, *Yorkshire Miners' Assocn.* v. *Howden* [1905] A.C. 256, 279–280, *per* Lord Lindley; *Russell* v. *Amal. Soc. of Carpenters* [1912] A.C. 421, 429, *per* Lord MacNaghten; and in this case Lord Atkinson, at p. 431, held that a registered union could not appear by its name as defendant to an action brought by a member to secure payment of benefits (*i.e.*, one caught by s. 4), because in a "common law action" such a voluntary society could not appear as a party and might be sued only by means of a representative action; this clearly implies that the contracts in issue were made not with the union but with the other members, and that the Act provided a procedural device.

[31] [1910] A.C. 87, especially Lord Atkinson, p. 110. The first ground in that case rested on the inability of their Lordships to believe that combinations so recently legalised by statute could have been legalised as a "combination for anything,"—(Lord Halsbury, pp. 92–93, where he says that the registered union is not a corporation); whereas, in retrospect, it could hardly be clearer that the statutory objects were meant to be descriptive rather than restrictive. Since the 1913 Act, s. 1 (1), the *Osborne* judgment must have lost its force. The *ultra vires* doctrine applies only to acts wholly outside the objects of the constitution; but as the rules do not always distinguish, and are not clearly required to distinguish (see Sched. 1, para. 2, 1871 Act), between "objects clauses" and other regulations, there is difficulty in applying it. One may note, with this in mind, the "*Foss* v. *Harbottle* trio" of union cases: *Howden's Case* [1903] 1 K.B. 308; [1905] A.C. 256; *Cotter's Case* [1929] 2 Ch. 49; and *Edwards* v. *Halliwell* [1950] 2 All E.R. 1064.

[32] [1946] K.B. 81.

[33] [1901] A.C. 426.

[34] pp. 139–141, a convincing analysis. See too Lord Keith, pp. 150–151; Lord Somervell, p. 155, and Evershed M.R. [1954] Ch. p. 499.

Acts the "manifest intent in the legislature" to incorporate,[35] —even in part—the registered union, an intent which judges seem previously to have required before reading legal personality into statutory creations.[36] That the intention of the Acts had for so long been unperceived is surely persuasive,[37] the more so in view of past discussions, such as that of 1894,[38] as to whether the unions *ought* to be incorporated in order to make them parties to enforceable collective agreements.

The Union an Unincorporated Society?

The argument so far presented amounts only to support for the status of "unincorporated association" expressly advanced by Lord MacDermott and Lord Somervell, and possibly, also, by Lord Keith. Before that view can be accepted, however, it is necessary to investigate the reasons they give for disapproving of *Kelly's* case,[39] which had since 1915 been the authority for the view that an expelled member could not recover damages, since on that disapproval rests their decision of *Bonsor's* case itself. Lord MacDermott, whose speech contains the most detailed analysis of the three, suggested[40] that three explanations of the decision could be found in the judgments in *Kelly's* case. The first, that the plaintiff in suing the "union" under its registered name was suing "himself among others,"[41] did not long detain him. Indeed, if any action can be brought by the member against his "union," whether it be for declaration, injunction, or damages, the union must be taken there to represent all the members except himself—

[35] Littledale J., *Tone River Conservators* v. *Ash* (1829) 10 B. & C. 349, 387.

[36] See, *e.g.*, Atkin L.J. in *MacKenzie-Kennedy* v. *Air Council* [1927] 2 K.B. 517, 533–534, whose approach is remarkably similar to Lord MacDermott's. *Cf.* Lindley L.J., *Salford Corpn.* v. *Lancs. C. C.* (1890) 25 Q.B.D. 384, 389. See too the caution displayed by judges before giving corporate status to creations of foreign law: *Krajina* v. *Tass Agency* [1949] 2 All E.R. 274; *Von Hellfeld* v. *Rechnitzer* [1914] 1 Ch. 748, 754 (with which *cf. Dreyfus* v. *I. R. C.* (1929) 14 Tax Cas. 560, 573–575).

[37] Prof. Lloyd agrees that it has been accepted that the Acts did not incorporate the registered union; but he then goes on to approve the trend to read into them all the incidents of corporateness not excluded: *op. cit.*, 127–128.

[38] See the Royal Commission on Labour, 1894, Report (Cmd. 7421), pp. 54 *et seq.*, Ss. 148–151, and, especially, the observations of a group of members which included Sir F. Pollock, at pp. 115–116, paras. 3, 6, 7 ("the extension of liberty to bodies of workmen and employers to acquire fuller legal personality than that which they at present possess is desirable in order to afford . . . the means of securing the observance . . . of collective agreements"), 8, 9 and 10. While not authoritative, these views of not uninformed observers are illuminating. See, too, the Minority Report of the 1869 Royal Commission (Cmd. 4123), pp. lix–lx (the basis of the 1871 Act); the speeches cited from the same period by Prof. Kahn-Freund, "The Illegality of a Trade Union" (1943) 7 M.L.R., p. 193; Hedges and Winterbottom, *Legal History of Trade Unionism*, pp. 65–67; Webbs, *History of Trade Unionism*, pp. 270 *et seq.*, 606; Geldart (1914) 2 Pol.Q. 17, 41, for similar non-judicial interpretations of the Act.

[39] *Kelly* v. *NATSOPA* (1915) 84 L.J.K.B. 2236 (C.A.).

[40] pp. 147–148. *Cf.* Lord Somervell, p. 157; Lord Keith, p. 153.

[41] Phillimore L.J., 84 L.J.K.B. 2236 at p. 2238.

a not unjustified extension of the *Taff Vale* treatment of the Acts.[42] It was in the second explanation that Lord MacDermott found the *ratio decidendi*.[43] The agents[44] of the union were, when they acted in his expulsion, "just as much the agents of the plaintiff as the agents of his fellow members."[45] To this argument Lord MacDermott replies that while the agents may be said to be acting on behalf of the plaintiff when investigating a complaint against him, they certainly cannot, when they expel him in a manner contrary to the rules, be acting on his behalf and under his authority.[46] Plainly the rules are the limit of the authority he has given to them to expel him. Lord MacDermott adopts the aphorism of Denning L.J.: "They were acting against him not for him"[47]; but, with respect, this may appear to introduce a new criterion, for it suggests the test not of authority but of benefit. The principal is free from liability for his agent's act, not whenever the latter acts against his interests, but when the act exceeds the authority he has given; and here the union rules were the only evidence of the agent's authority (express, implied or ostensible[48]).

In parenthesis, it must here be remarked that the problem of agency and authority also affects certain analogies drawn by Lord Somervell[49] and Lord Keith, on which their Lordships place some reliance. The latter, to take one example, defeats *Kelly's* case by the "simple example" of a member "illegally expelled by a majority of members at a general meeting which is sufficient to bind the union."[50] That member, he concludes, can clearly sue

[42] But as Prof. Lloyd points out, *op. cit.*, p. 134, there may be difficulty in his enforcing judgment against a fund of which he is still "co-owner." Presumably no analogy would be drawn with cases like *Re Addlestone Linoleum Co.* (1887) 37 Ch.D. 191.

[43] Lord Somervell seems to agree.

[44] In *Kelly* the committee, in *Bonsor* the Brighton secretary, but nothing turns on the difference (Lord MacDermott, p. 147); and, for brevity, the general term "agent" is here used throughout.

[45] Bankes L.J. (1915) 84 L.J.K.B. 2236 at p. 2239.

[46] pp. 148–149. It is true that his Lordship says that "Expulsion from membership of a trade union stands, as a breach of contract, in a special category." But, in its context, this remark seems to be directed only to showing that the expulsion cannot be held to have been effected "on his behalf." He deals with the other question of whether the *other* members are bound by these acts on pp. 147–148, and this is discussed below.

[47] [1954] Ch. 479, 513.

[48] It is suggested that ostensible authority can, as between the members, mean no more than the authority implied by the rules; but, as will be seen, that submission is not essential to the argument which follows.

[49] p. 157. "If . . . the many by themselves, or through the agents of the association, purport to deprive the one of his contractual rights" he must be allowed to sue for damages. It is the words "through the agents" which, it is respectfully submitted, here obscure the problem of authority. Thus, "whether an agent can evince an intention . . . (not to be bound by a contract) . . . on behalf of the principal must depend upon the agent's authority," *per* Singleton L.J., *Dumenil (Peter) & Co.* v. *Jas. Ruddin, Ltd.* [1953] 1 W.L.R. 815, 821.

[50] p. 153:—presumably procedurally satisfactory and therefore sufficient. Lord Keith agrees that the "minority" could not be sued personally.

the "union" for damages. But, as he remarks, that problem is "clear of any question of agency." If the ten other members of my club exclude me in breach of our contract, no doubt I can sue them.[51] But that conclusion does not solve problems of which agency is the crux.

The third proposition expressed in *Kelly's* case is critical. Lord MacDermott discusses it second, and this may explain why it figures less prominently than might have been expected in his speech, since it is only here, it is submitted, that he expressly gives a reason for attaching liability to the other members who are, for him, the "union." Bankes L.J. had said that if the agents acted "without authority and in defiance of the rules" the member excluded could not "contend that they were at the same time the authorised agents of his fellow-members."[52] The argument does not depend only upon the authority of *Kelly's* case; Jenkins L.J. put the point independently in this way in *Bonsor*—the member is saying to his fellows, "Our common agent . . . has without our authority and in breach of the rules, purported to exclude me from membership. I must admit that you did not authorise this wrongful act any more than I did. . . . Nevertheless, I claim damages from each and every one of you on the ground that this wrongful and unauthorised act of the secretary in itself constituted a breach by you as his principals of the contract of membership subsisting between us."[53] It is not easy, if the matter be put in that way, to see why the other members should be liable in damages. What if the secretary had met Bonsor on the beach and, on personal grounds, had decided to expel him from the union? What if the secretary of a members' club wrongfully excludes all the members except one? Why is it that the members are not bound by the act of an intruding stranger?

The point may really be put by way of a dilemma.[54] The agents acted either within whatever authority they had, or outside it. If the former, they bound all the members; if the latter, none. The problem for those who, with Lord MacDermott, designate the union an unincorporated group, is to discover some authority

[51] Similarly, agents who expel may incur a personal liability, frequently because they are members and break the membership contract. *Cf. Watson* v. *Smith* [1941] 2 All E.R. 725 (damages against union committee; s. 4 of the 1871 Act not argued); and see *Murphy* v. *Synnott* [1925] N.I. 14 (proprietary club owned by company; committee members (who were not directors) liable in damages to member wrongly excluded, a liability which seems to rest on the breach of contract contained in the articles *between members*; but see Buckley, *Companies Acts* (12th ed.), p. 53).

[52] (1915) 84 L.J.K.B. 2236 at p. 2239.

[53] [1954] Ch. 479, 523.

[54] Put by Prof. Lloyd in his earlier note on the C.A. decision in *Bonsor* in (1954) 17 M.L.R. 360, where he considered "that the only effective way out of this dilemma is to postulate a separate entity, *viz.*, the union itself, distinct from its members, and then to say that the committee has acted on behalf of the union itself and within the scope of its implied authority." The implication of such authority is touched on later when Lord Morton's speech is again discussed.

emanating from the other members which does not stem equally from the plaintiff himself. His Lordship takes account of the problem. Indeed, he is for "the purposes of this appeal . . . prepared to accept" the proposition "that a member of a voluntary association who is injured by some wrongful act done by an agent of the association on behalf of its members, including himself, cannot recover against his fellow-members whose responsibility, in the circumstances, will be no greater than his own." [55] He nowhere expressly states, as Professor Lloyd suggests that he means to say,[56] that the act of expulsion is to be "treated not as the collective act of the whole body of members including the expelled member, but of that body minus the expelled member." It is not at all apparent why such an act should be so treated unless some trace, at least, of authority can be found.[57] Furthermore, it is submitted that his Lordship meant to give a very different answer to the problem, namely production of liability not through the presence of any initial authority but through ratification of an *unauthorised* act, and it is in this part of his speech that his route to the award of damages diverges from the paths of the "unincorporated association."

Apart from the suggestion made by Professor Lloyd, what answers could have been given to this problem? First, it might have been said that the agents had authority to deal with expulsions, an authority which extended even to a wrongful mode of its exercise. On this, a possible, but unacceptable,[58] view, the required result can be obtained only by finding that the plaintiff had unilaterally withdrawn *his* authority before the expulsion was complete. But the rules in *Bonsor's* case precluded any such argument; no findings were made on which it could rest; and, more, the argument is hard to sustain because such a withdrawal of authority surely involves the member in total resignation from the union [59-60] if he is not to approbate and reprobate, whereas the assertion made by Kelly and Bonsor was that they were still members. It is a very different answer that Lord MacDermott gives. Both his Lordship, and Lord Keith, appear to have decided that the initial act of expulsion bound none of the members, since both at one point base liability upon a ratification of that act.

[55] p. 148.

[56] *Op. cit.*, p. 131.

[57] The judges have, in previous cases involving expulsion from unincorporated associations and the like, restricted to the words of the rules the authority given to agents by all the members. Why should *some* of the members be "treated" as impliedly giving more? (*Cf. Dawkins* v. *Antrobus* (1881) 17 Ch.D. 615, 620; *Wolstenholme* v. *Amal. Musicians' Union* [1920] 2 Ch. 388, 394; *London Assocn. for Protection of Trade* v. *Greenlands* [1916] 2 A.C. 15, 39.)

[58] Particularly unacceptable when the secretary appears to have had no authority at all to expel for arrears.

[59-60] Compare Lindley, *Law of Partnership* (11th ed.), p. 283. Unless the rules otherwise provided, resignation would take effect immediately upon notification to the secretary: *Finch* v. *Oake* [1896] 1 Ch. 409.

A principal ratifies only where the agent failed to bind him at the time of the act. Lord MacDermott says,[61] in discussing the remarks of Bankes L.J. mentioned above: "Had the union there disavowed the action of the committee the reasoning of this passage would be plainer, but instead of doing that the union appears from the reports to have approved the views of the committee and to have adopted what it had done. Here the relevant facts preclude the point, if anything, more clearly. There is little more the Musicians' Union could have done to identify itself with the expulsion of Mr. Bonsor. It has made the act of the branch secretary its act and cannot now say that because the expulsion was unauthorised by the rules it has no responsibility for it."

It must be remembered that, on the hypothesis of "unincorporated body," the "union" here stands for the other members, and no more. Can an adoption, or ratification by, or for, the other members be spelled out of the *Bonsor* situation? Two arguments which might have been called in aid in order to do so were not expressly invoked. First, it might be suggested that the other members themselves ratified. Since there had been no union conference, and since ratification demands some act of adoption preceded by knowledge of, or waiver of knowledge of, all the facts,[62] ratification by them could have been produced only by pressing into service some extreme doctrine such as that found in analogous company law cases (*e.g.*, on improper forfeitures), in which shareholders have been held to have ratified by acquiescence alone where "facts were made known to (them), into the effects of which they might and ought to have inquired, and to which they ought to have objected at the time, unless they intended to adopt the transaction."[63] But no such finding was or could have been made in *Bonsor's* case, and it is submitted that there

[61] pp. 147–148. Lord Keith, at pp. 153–154, has a similar passage, recognising the possibility of "disclaimer" by the union, but rejecting such an argument because of the attitude of the union in this case. It is, however, respectfully suggested that the burden cannot be upon the "union" to disclaim, as Lord Keith seems to suggest.

[62] *Marsh* v. *Joseph* [1897] 1 Ch. 213, 246. It is true that the courts are quicker to discover ratification by acquiescence where there was an initial but exceeded authority than where there was none at all; but that consideration does not assist the argument.

[63] Brett L.J. in *Phosphate of Lime Co.* v. *Green* (1871) L.R. 7 C.P. 43, 63. *Cf.* the "Agriculturist Cattle" cases (1868) L.R. 3 H.L. 175, 249, 263, and the discussion in *Ashbury Ry. Carriage Co.* v. *Riche* (1875) L.R. 7 H.L. 653, 675, and Buckley, *op. cit.*, pp. 823 *et seq.*; and *Ho Tung* v. *Man On Insurance* [1902] A.C. 232, 236. Most cases require full knowledge and evidence of adoption: see *Ashbury* v. *Watson* (1885) 30 Ch.D. 376, 381–382. Also, on this and the previous note, see *Bigg* v. *Strong* (1858) 32 L.T.(o.s.) 98 ("There must be silence under circumstances which led to the conclusion of there being assent."); *The Australia* (1859) 13 Moo.P.C.C. 132, 158; *Benham* v. *Batty* (1865) 6 New Rep. 42. The plaintiff must usually discharge the burden of proof of knowledge: *Wall* v. *Cockerell* (1863) 10 H.L.C. 229, 243; the effect of the company law cases may be to reduce that burden where it is not possible to show full notice to each member.

was nothing whatever to show that the expulsion was "subsequently ratified by the union membership." [64]

Secondly, the expulsion might have been ratified by agents acting for the other members. When the Executive first stood behind the Brighton secretary, or sanctioned the refusal to readmit Bonsor to the union, did it not ratify for them? But the committee acts as agent, and the problem of authority again here rears its head. Whatever was said about the difficulty of attaching liability to those not expelled for the initial wrong now applies equally to their alleged liability as principals on the ratification. Again they could be bound no more or no less than the plaintiff, unless some special authority from them can be found.[65] The contrary contention would lead to the extraordinary conclusion that the committee of a club which wrongfully expels a member does not, there and then, bind the members, but can bind the remaining members by a subsequent ratification of its own act. Where the affairs of a large group are in the hands of a committee, it might, perhaps, be argued that the members have given the committee power to adopt or reject acts on their behalf, although this would run counter to the usual interpretation of the rules.[66] If this is what the union rules meant, however, surely someone would have said so; and, worse, even if they had said so, would not Bonsor have given that authority equally with the rest of the members? It is plain that he did not. Whence does the implication spring that the others did? The circle is complete again. Similar objections can be levelled at arguments which pick out any other act of the agents as the act of adoption—*e.g.*, their continuance of the closed shop system which deprived Bonsor of his livelihood.[67] As for more lowly agents, it is true that the branch committee was empowered under Rule 27 (7) to expel for arrears unless a satisfactory reason was given by the member.[68] But that gave them

[64] Prof. Lloyd, *op. cit.*, p. 132. The members' continuing to work the closed shop system might be said to be an act of adoption; but there was nothing even in this to link all the members to the particular expulsion. See, further, n. 67.

[65] Again, ratification for *all* the members is easier to produce than for some. In *Smithies* v. *N.A.O.P.* [1909] 1 K.B. 310, 339 (an action commenced before the 1906 Act was effective) it was said that the central committee could be regarded as having ratified for the members acts which were tortious when it supported the strike: *cf.* Buckley L.J., pp. 334–335. The committee clearly had power to take action such as payment of strike pay under the rules: p. 313.

[66] Apart from cases cited earlier, see *Martin* v. *Scottish T. & G.W. Union* [1952] 1 All E.R. 691, where the committee cannot have had power to ratify acts of officials which contravened the rules; such an implication would have amounted to an evasion of Sched. 1 (3) of the 1871 Act, and this point might well be made against any such argument of implied power to ratify.

[67] It might be suggested that this deprivation of livelihood amounted to a direct breach by the other members of an *implied term* in the membership contracts whereby all impliedly promised to use this weapon only against those rightfully excluded. But, like most "implied term" arguments, this is to do little more than assert that the plaintiff shall have damages, is not devoid of danger for that reason, and is not the reason their Lordships give, except in so far as it resembles that of Lord Morton, discussed below; see n. 73.

[68] [1954] Ch. 479, 482.

no power to ratify wrongful expulsions; or if it did, only in a way which gives rise to the old problem of finding some special reason for binding the other members alone. In any case, "the question of the plaintiff's exclusion was not considered nor resolved upon by any branch committee or meeting." [69]

It seems plain that Lord MacDermott did not intend to introduce either of these arguments into the passage concerned with ratification. Both contain difficulties which would have required considerable discussion, and Lord MacDermott merely states that the *union* has made the secretary's act *its* act, for which *it* must take responsibility. If the argument advanced above is correct, *it* has ratified, when the members did not ratify, the act of expulsion. Such an adoption of "realist" language surely causes the whole of his Lordship's previous analysis to stand in peril. Can *it* be said not to have capacity to contract, when it has the capacity to produce liability in the members in this way for breach of contract? A similar point can be made on Lord Keith's speech, and more easily made in view of his Lordship's "intermediate position" on the first question of "legal entity or unincorporated association?" If the union is a special "creation" of this sort,[70] then, at least, *Bonsor's* case may not be applicable to wholly unincorporated bodies, including unregistered unions. And it seems unlikely that the registered union will in future be held not to have the capacity to enter into contracts.

So to argue, however, is not to attempt to put Lord MacDermott into the camp of Lord Morton. Liability, on the view of Lord MacDermott and Lord Keith, seems to rest upon ratification by the "union," but Lord Morton, instead of relying upon ratification by the quasi-corporate union, says [71] that the "union broke this contract by wrongfully expelling Mr. Bonsor," *i.e.*, broke it at the time of the expulsion. This result his Lordship seems able to produce because he holds that the union, (for him, of course, a party to the contract of membership), "impliedly agreed that Mr. Bonsor would not be excluded by the union *or its officers* otherwise than in accordance with the rules." [72] This surmounts the problem raised by the fact that not even an incorporated union is liable for the act of "agents" to whom it has given no authority, express, implied or ostensible. Since it seems clear that the word "officers" here includes agents down to the level

[69] *Ibid.*, p. 480.

[70] The Executive Committee might in that case be regarded as acting as the *alter ego* of the "union," and an implication of authority might be made, as suggested by Prof. Lloyd, *supra*, n. 54. For two cases of ratification by the "corporation" by little more than acquiescence see *Smith* v. *Hull Glass Co.* (1852) 21 L.J.C.P. 106 (Jervis C.J. and Cresswell J.); *Allard* v. *Bourne* (1863) 15 C.B.(N.S.) 468 (Williams J.).

[71] p. 127. Lord Porter's view on this question is not expressly made clear, but it is reasonable to suppose that he is saying the same as Lord Morton. It must be admitted that the words of the latter are capable of bearing more than one meaning.

[72] *Ibid.* Italics supplied.

of branch secretary, Lord Morton is implying into the contract of membership a term whereby the union is made to *guarantee* to the member that none of its agents, however lowly, will ever exceed the authority given by the rules relating to expulsion.[73]

The Consequences of a Blow for Freedom?

With some reluctance, therefore, it must be suggested that *Bonsor's* case can be interpreted as meaning that the union acquires by registration some "existence" in law apart from the members, and that this probably includes the power to enter into contracts, since it is only on this basis that the award of damages, so justifiable on the merits, can be justified in law. The cause of reluctance is the feeling expressed earlier that, if the contemporaries and authors of the 1871 Act would have been surprised by *Taff Vale*, they would, if the interpretation of it given here be right, be astonished by *Bonsor*. At its lowest, it will be important for the unions to realise that, if judges follow the ratification argument of Lord MacDermott, they may have a breathing space for disavowal before being liable in damages for some ill-advised act of a minor official. This consideration prompts the suggestion that, if a new clause is to be added to union rules to deal with *Bonsor*, it might

[73] It may be doubted whether the union would have said "Oh, of course" to such an implied term, since, as it was put in an article in *The Times* for January 16, 1956, p. 6; "From the trade union point of view, the danger is that they have many spare-time officials who may inadvertently break their rules and thus involve the union in damages." Lord MacDermott might have used a similar argument by implying a term into the contract between *members* whereby each promised that union agents should have power to bind him in purported expulsions *unless* he was the victim. An implied term of this sort is not, of course, an impossibility. But if it is to be more than a device for "making law," it cannot be a consequence of the mere fact of association, and there must be something to indicate that it represents the intention of the members as expressed through the rules; and that is not apparent in *Bonsor*. (*Cf.* nn. 57 and 67, *supra*.) Furthermore, the "ratification" argument seems to show that Lord MacDermott did not intend to make use of such implications. It may be noted, too, that where the society is incorporated, one may more easily treat the act of central managers as the act of the corporation than so construe the acts of minor officials. (See the summary of the *alter ego* cases by Denning L.J. in *Bolton (Engineering) Co. Ltd.* v. *Graham & Sons, Ltd.* [1956] 3 W.L.R. 804, 813.) Thus, wrongful expulsion by the Committee empowered to deal with expulsions can more easily be regarded as a direct breach of contract or a ratification by the corporation. See, n. 70, *supra*; and *Wright* v. *Baths Club Company, The Times*, July 14, 15, 16, 1926; damages against company owning proprietary club; Horridge J. said, "What (Capt. Wright) said was 'I entered into a contract with a limited company that on paying my entrance fee and subscriptions I should be entitled to use the club unless properly expelled.' The defendants do not deny that the plaintiff has been improperly expelled." (It is interesting that he also there points out that the remedy against a proprietary club is damages, not an injunction, whereas against an unincorporated members' club the appropriate remedy was the injunction, a point which may still have some validity: *Baird* v. *Wells* (1890) 44 Ch. D. 661, 675–676; and Denning L.J., *Lee* v. *Showmen's Guild of Gt. Britain* [1952] 2 Q.B. 329, 341–342.) The point, therefore, made about Lord Morton's analysis would not have pressed his Lordship in *Kelly*, where the act was that of the executive committee rather than a branch agent with no power to expel.

take the form of an express promise by members not to claim damages before the committee or some other arbitrator (perhaps the court), had pronounced upon a disputed expulsion. Such an answer would, undoubtedly, be more acceptable, both to members and to public opinion, than any clause which attempted to exclude altogether "legal relations" from the contract of membership—a course which, as Professor Lloyd has suggested,[74] might prevent registration of the union by the Registrar.[74a] More important, however, are the consequences of the view that the registered union now has a capacity to contract. Although current opinion[75] seems to favour the view that collective agreements between unions and employers (who may also be organised in a trade union, in the legal sense), rarely give rise to more than a "morally binding code of conduct,"[76] any particular agreement might be found to contain an intention to create legal relations and, unless section 4 of the 1871 Act applied,[77] be directly enforceable without procedural

[74] *Op. cit.*, pp. 134–135. The statutory definition of a trade union (see Citrine, *Trade Union Law*, p. 296), demands a "combination, whether temporary or permanent," and a "constitution." Neither the definition, nor the provisions of Sched. 1 (2) of the 1871 Act, are easily satisfied by an agreement wholly lacking in rights and obligations. In a rather different context, compare the construction put upon "association" in (now) s. 434 of the Companies Act, 1948, as something which needs "mutual rights and obligations": *Smith* v. *Anderson* (1880) 15 Ch.D. 247, 273, 274, 275; *Re Caledonian Employees' Benevolent Soc.* 1928 S.L.T. 412, 414. Compare, too, *Re Nat. Union of Ships' Stewards, etc.* [1925] Ch. 20, 28–30 (a union must be "in existence" before it can be registered).

[74a] Counsel has now advised the T.U.C. General Council against any action of this, or any similar, kind: "for example, by unions cancelling their registration; by segregating special funds . . . ; by making the contract . . . binding in honour only; by providing . . . for arbitration to precede court action; by . . . making it clear that the rules of the union provide a contract between a member on the one part and all of the other members on the other part and no other; and so on" (1956 Report to Congress, para. 437). It is, of course, still open to a particular union to adopt some such clause. In view of what follows in this article, it must also be noted that counsel "advised against any immediate attempt by the General Council to seek to abrogate the Judgment by legislation. To do so would, in Counsel's opinion, *involve the risk of inviting other reforms in the law affecting trade unions*" (*ibid.* Italics supplied). See, *infra*, n. 86. In view of the importance of the problem to the unions, it seems a little odd that the final decision of the Council is, apparently, to be largely determined by "the amount of the damages to be awarded to the Bonsor estate" (*ibid.*); but their "present intention" is to "leave the matter where it is."

[75] *e.g.*, Prof. Kahn-Freund, in Flanders and Clegg (ed.), *op. cit.*, pp. 56–58.

[76] As the rather different "Bridlington Agreement" between the unions affiliated to the T.U.C., was termed in *Spring* v. *Nat. Amal. Stevedores, etc., Soc.* [1956] 2 All E.R. 221, 225–226.

[77] S. 4 is further discussed below. It provides that "Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of" certain agreements, including "(1) any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed; (2) Any agreement for the payment by any person of any subscription or penalty to a trade union; (3) Any agreement for the application of the funds of a trade union:—(a) To provide benefits to members . . . (4) Any agreement made between one trade union and another." "The construction of section 4 has caused considerable difficulty and has given rise

difficulties. Of greater importance, perhaps, is the result foreseen by Lord MacDermott himself.[78] If the rules of the union are so framed as to make it clear that the only contract arising therefrom is one between the member and the union, section 4 (1) of the Act is plainly excluded since it deals with agreements "between members." Actions for damages on the contract of membership will not then usually fall within the agreements mentioned in section 4, unless they are for payment of subscription, benefit, etc., and in this way *Bonsor* may be found to be a double-sided coin. Disobedience by members of orders given, within the rules, by the Executive Committee (*e.g.*, to come out on strike), might then be punished even by actions for damages,[79] and this even where the union rules were in restraint of trade at common law, as they almost certainly would then be. If the rules were drafted so as to incorporate a reference to the "Bridlington Agreement" and give to the union power to expel any member whom in the eyes of the T.U.C. disputes committee it should not have enrolled,[80] they might easily impose on the member an obligation not to contravene that Agreement, breach of which could be remedied in damages. Also, a registered union from which a member was lured could sue the officials of a splinter union which lured him for inducing a breach of contract,[81] and no problem of the "unenforceability" of the latter would arise. Participation in an "unofficial" strike could result in the member being liable in damages to his union. The union's capacity to enter into contracts may not be a necessary requirement for each of these remarkable conclusions; but it does allow for the removal of doubt from many, and, in particular, allows for the easy circumvention of section 4 (1). Membership of an unregistered union may be a very different thing from membership of one registered with skilfully drafted rules.

On the other hand, much of the previous paragraph contains a proviso that section 4 does not apply. Certainly, if the argument was right, section 4 (1) will rarely be relevant. But if the union's objects are unlawful at common law as being in restraint of trade, and the agreement in question is, for example, a collective agreement between two unions, or an action for payment of benefit or subscription, section 4 will prevent direct enforcement since the legality of the union will depend upon section 3 of the Act. It is sometimes assumed that section 3 is really the only relevant section

to a vast quantity of case law," Citrine, *op. cit.*, p. 87; see too pp. 95–106, where he discusses the cases on "direct" and "indirect" enforcement, a problem which cannot be discussed here in detail.

[78] p. 136.

[79] *Quaere* whether, even if s. 4 applied, the "indirect" remedies of injunction and declaration might not be obtainable. Citrine, *op. cit.*, p. 105, thinks not; and see *infra*.

[80] They did not in *Spring's* case (*supra*) or *Andrews* v. *Nat. Union of Public Employees*, *The Times*, July 9, 1955, p. 11. In both cases the member's lack of knowledge as to the Bridlington machinery was important as a factor in the court's refusal to *imply* any term to this effect. See further n. 87.

[81] Neither s. 3 nor s. 4 of the 1906 Act would protect them.

of the Act in this respect [82]; but this assumption may be open to question. It is surely from registration under section 6 of the Act that the union acquires its ability to be a party to proceedings and to a contract, and such an acquisition seems to be caught by the words: "Nothing in this Act shall enable any court" to enforce directly the specified agreements.[83] In that case, no "direct" action could ever be brought against, or by, a registered union on such an agreement, whether or not the union was lawful at common law. Subject to all the difficulties of that procedure, an unregistered lawful union might perhaps make use of a representative action to sue or be sued. But the suggestion which was previously open on the basis of certain dicta in the *Taff Vale* case,[84] that a registered union might similarly be attacked or attack through a representative action, now seems impossible to sustain if the union, as such, and not the members, is regarded as the party to the contract, and the action involves direct enforcement. The distinction between registered and unregistered unions becomes curiouser and curiouser; and, if it be permitted to revert to an earlier part of this note, this curious situation might well have led to the conclusion that the legislature had not intended to produce anything so strange.

A New Start?

The real problem and the real damage in the *Bonsor* case, arose out of the existence of the lawful "closed shop." [85] Either answer to the problem raised (either denial of damages, or the award of damages by what, it has been submitted, is a novel piece of judicial argument), was likely to give rise to the suggestion that the legislature should consider afresh the whole position of trade unions. The unions would not have everything to lose by such a review; it seems unlikely that responsible union leaders would insist that in the second half of the twentieth century the law should continue to be based upon rules which treat their organisations as no more

[82] See, *e.g.*, *Gozney* v. *Bristol Trade and Prov. Soc.* [1909] 1 K.B. 901 (esp. Fletcher-Moulton L.J., pp. 917–918); *Osborne* v. *Amal. Soc. of Ry. Servants* [1911] 1 Ch. 540 (esp. Cozens Hardy M.R., 551, Fletcher-Moulton L.J., 556) where the point raised here does not seem to have been discussed. As Citrine, *op. cit.*, p. 91, points out, the latter case was also one of indirect enforcement; and in *Swaine* v. *Wilson* (1890) 24 Q.B.D. 252, the society was unregistered. In *Miller* v. *A.E.U.* [1938] Ch. 669, the point seems to have been argued (671–672) but not decided (675, Morton J.).

[83] See in support of this suggestion, Lord Atkinson in *Russell* v. *Amal. Soc. of Carpenters and Joiners* [1912] A.C. 421, 431.

[84] See, *e.g.*, Lord Lindley [1901] A.C. 443. On the difficulties of the representative action under R.S.C., Ord. 16, r. 9, see Prof. Lloyd, *op. cit.*, 133–134; (1949) 12 M.L.R. 409; (1953) 16 M.L.R. 359.

[85] England seems to be alone among the democracies in not restricting the legality of the manifold practices which are commonly referred to under this title. See Prof. Lenhoff, "The problem of Compulsory Unionism in Europe," (1956) 5 Am.Jo.Comp.Law, 18 (for reference to which I am indebted to Dr. Lipstein).

than legalised "instruments of revolt."[86] The problems of wrongful expulsion are a small part of the whole picture, and a solution to them as easily evaded as this one is not even an effective blow for individual freedom. Unhappily, if the unions feel that this is another piece of novelty in the tradition of the earlier cases of this century, their by-now-traditional feeling that they should remain as far as possible outside the reach of the courts will be accentuated,[87] and, although it may be true that industrial problems are best solved outside the law courts, no legal system which prizes freedom can view such a development with equanimity. Cogent arguments can be advanced for a complete review of trade union law, and even for some statutory restriction upon rules, in theory contractual but in fact imposed, which unjustly penalise the

[86] Prof. W. A. Robson, "The Future of Trade Union Law," (1930) 1 Pol.Q. 86, 102: see his proposals at p. 103. It may now be suggested that it is time to remove any possible stigma of "common law illegality" from the unions; to provide for universal registration of these and similar bodies; to render enforceable all contracts with and within the union; to allow members to sue on collective agreements made for their benefit; and, possibly, to modify s. 4 of the 1906 Act (which provides immunity in tort) after the satisfactory codification of certain torts. This section may well be the biggest obstacle to reform, and it is difficult, in view of the attitude to the unions which it has helped to foster, not to agree with the Webbs (*op. cit.*, pp. 607–608) that it would have been better in 1906 to have insisted upon a "complete reform of the law, to which, when properly reformed, Trade Unions should be subject in the same way as any other associations." But the law of tort seemed then to threaten the very existence of the unions; and the judicial developments meant that even the doctrine of restraint of trade had not lost its terrors: *cf.* Prof. Kahn Freund, *op. cit.*, (1943) 7 M.L.R. 192; and see generally, pp. 204–205. If reform is possible, it may be that the reconsideration of the Industrial Disputes Order, 1951, will provide the right occasion for a wider review.

[87] See the reaction of the T.U.C. to the decisions (*Spring's* case and *Andrews'* case) which withdrew the sanction of the law from the effective operation of the Bridlington Agreement. The T.U.C. was well aware, when it ordered N.U.P.E. to expel in the dispute which gave rise to the *Andrews'* case, of the likely legal consequences: see General Council Report, 1954, Congress Report, p. 106, which describes how N.U.P.E. had warned the T.U.C. of impending challenge in the courts; they were "unwilling to expel him and were concerned to do so only by virtue of the award and the sanction (of disaffiliation) hanging over their heads": Wynn-Parry J., *The Times*, July 9, 1955. On the other hand, a glance at Congress reports shows how valuable is the work of the T.U.C. in enforcing the Bridlington Agreement to arrange the affairs of over-lapping unions in an orderly fashion: 1955 Report, pp. 92 *et seq.* (where the Nat. Amal. Stevedores, etc., Society's dispute with the T. & G.W.U. is reported); and 1956 Gen. Council's Report, Sect. B (same case, para. 6). The 1956 Report, paras. 7–16, shows that the General Council has overcome its reluctance to recommend to all affiliated unions an answer to the *Andrews* and *Spring* cases; it advised Congress "that in view of the imperative need to maintain effective machinery for the settlement of inter-union disputes it was necessary for all affiliated unions to amend their rules to enable Executives to exclude a member if required to do so in order to conform to an Award of a Disputes Committee"; and the T.U.C. has sent a proposed rule to all unions which asked for information. This method of escape has been preferred to an amendment to the 1906 Act which was thought to be "inadvisable." The—(in this case not wholly unjustifiable)—impatience felt by unions towards the activities of the courts was well illustrated at one point in the dispute with N.U.P.E. where the T.U.C. Committee "expressed disappointment that as regards several . . . Awards . . . not yet implemented by N.U.P.E. the union's representatives were still merely reiterating the *legal* difficulties in the way of excluding wrongfully recruited members."

individual. But when such reforms are considered, it would be well to have in mind the fact that trade unions are not the only powerful bodies "more equal" than individuals; the whole problem of "freedom of contract," and its relation to transactions between private citizens and groups exercising social power, will need to be considered before a structure can be found into which the unions can fit without their current suspicion and mistrust. However courageous, judicial revision of the law can hardly, and should not, be expected to effect that policy in a manner sufficiently comprehensive.

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RATIO DECIDENDI AND THE HOUSE OF LORDS

THE Latinity of the phrase *ratio decidendi* has not preserved it from the ambiguity of English words: indeed it may be responsible for some of the ambiguity since as a mere matter of translation it may be rendered equally by the phrases "reason for deciding" and "reason of decision." Judges and scholars alike use the phrase on some occasions for *any* reason which influences the ultimate decision,[1] whether it be a finding of fact, or a determination of law, or an opinion about social circumstance or public policy, and on some occasions for a rule of law, whether influencing the court or not, for which it is thought the case can be used as authority. While such flexibility is doubtless not wholly disadvantageous, it is often productive of confusion. The confusion surrounding the use of *ratio decidendi* is only slightly lessened by the convention under which it is more often used to refer solely to some *rule of law* which is connected in some way or another with the decision. This convention is properly recognised by Glanville Williams in his instruction to the student beginning to learn the law when he "translates" *ratio decidendi* as "the rule of law upon which the decision is founded."[2] But the translation is ambiguous, for while it might appear to mean 'the rule of law upon which the judge founded his decision," it is clear that Glanville Williams accepts the terminology adopted and the doctrine expounded by Goodhart in *Determining the Ratio Decidendi of a Case*,[3] whereby the *ratio decidendi* of a case is not the rule of law propounded by the judge as the basis of his decision. Paton asserts, in accordance with the language of many jurists but not with that of the judges, that *ratio decidendi* means the rule of law for which a case is binding. There is no ambiguity in his exposition; he says that "The classical view was that the *ratio* was the principle of law which the judge considered necessary to the decision."[4] This sentence does not embody an explanation of the *meaning* of the word *ratio*, but a *criterion* of the already defined *thing*. It is this "classical" view which Goodhart controverted. I have argued that it is better to use the phrase *ratio decidendi* to mean exclusively the principle of law propounded by the judge as the basis of his decision, a usage

[1] A recent example of *ratio decidendi* being used to denote something other than a rule of law is to be found in (1955) 71 L.Q.R. at p. 25. Coutts there asks, in reference to a case, "What then is the *ratio decidendi*?" He proceeds to consider as a possible *ratio decidendi* a particular finding of fact.

[2] *Learning the Law* (3rd ed.) 1950, p. 57.

[3] *Essays in Jurisprudence and the Common Law*, p. 1.

[4] *Jurisprudence* (1st ed.), p. 159.

which would correspond with judicial usage [5]; and to dispense with a succinct term for the rule of law for which a case is of binding authority. But the question of terminology, though not unimportant, is a subsidiary one. The main question is whether, to use Paton's language, the "classical view" is still correct. According to the doctrine of precedent, is "the principle of law which the judge considered necessary to the decision of the particular case before him" binding or not? [6] There has been very little judicial authority on this point. Most jurists have, like Goodhart,[7] said it is not binding. But now a Northern Ireland case has appeared in support of the doctrine accepted by the South African courts [8] that the classical view is still law.

In *Walsh* v. *Curry and others* [9] the Court of Appeal of Northern Ireland considered the authority of *George Wimpey & Co., Ltd.* v. *British Overseas Airways Corporation* [10] in relation to section 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935, because it was dealing with the interpretation of a precisely similar enactment, *viz.*, section 16 (1) (*c*) of the Law Reform (Miscellaneous Provisions) Act, Northern Ireland, 1937. *Wimpey's* case is a decision of the House of Lords, and we all say in that simple, lucid, uncritical and unrealistic style, which is perhaps the main characteristic of legal speech, "The House of Lords is the highest judicial authority for the United Kingdom. Its decisions absolutely bind all lower courts." [11] But when our thinking caps are firmly on

[5] "The Language of Precedent," 2 West.Aust.L.J. at p. 323.

[6] The "classical view" may be regarded as true even though the principle stated by the judge is subsequently held to be too broadly expressed as a binding rule of law. There is abundant authority for reading a judgment *secundum subjectam materiam*. The important question is whether the proposition propounded by the judge may, so far as its binding character is concerned, be entirely ignored. That it can be so rejected is, *pace* Paton, the thesis of Goodhart.

[7] Glanville Williams accurately summarises Goodhart's thesis in the following sentence. "The *ratio decidendi* of a case can be defined as the material facts of the case plus the decision thereon": *Learning the Law* (3rd ed.), 1950, p. 57.

[8] The Goodhart thesis was specifically considered and rejected in *Pretoria City Council* v. *Levinson*, 1949 (3) S.A. 305 (A.D.), see *per* Schreiner J.A. at p. 315. In *Fellner* v. *Minister of Interior*, 1954 (4) S.A. 523 (A.D.) the difficulties are considered of determining for what rule of law a decision of a multi-judge tribunal is of binding authority when the *rationes decidendi* of the individual judges differ. See the illuminating note by Honoré: (1955) 71 L.Q.R. 196.

[9] [1955] N.I. 112.

[10] [1955] A.C. 169. At the time of the hearing of *Walsh* v. *Curry*, *Wimpey's* case had not been heard in the House of Lords. "As that case was then under appeal to the House of Lords we thought it well to defer our determination of the present appeal until the conclusions of their Lordships had been published": *per* Lord MacDermott L.C.J. [1955] N.I. at p. 121. It is submitted with respect that the argument of counsel could also have been adjourned, since so much was thought to turn on the examination of the speeches of the Lords. The procedure adopted by the Court of Appeal led to their consideration of the difficult problem of the legal consequences of *Wimpey's* case without hearing counsel. Certainly such a procedure is not consistent with the "umpire" theory of the judicial function.

[11] Hughes, *Jurisprudence*, p. 223.

we realise the need for qualification even at the expense of conciseness and we ask: (i) are decisions of the House of Lords from the English Court of Appeal binding on the courts of Northern Ireland, and vice versa? [12]; (ii) what is meant by a "decision" of the House of Lords? *Walsh* v. *Curry* provides authority for answering both these questions.

An atomistic view of the nature of the common law, the approach of Lord Buckmaster in *Donoghue* v. *Stevenson*, of the United States Supreme Court in *Erie Railroad Co.* v. *Tompkins* [13] leads to the argument that since Northern Ireland is an independent legal system there is a Northern Ireland "common law." [14] Northern Ireland has its own courts, and its separate courts, producing their own decisions, lead to a separate law, the aggregate of those decisions. The House of Lords is only part of the system of Northern Ireland courts when determining appeals from Northern Ireland. Decisions of the House of Lords on appeal from the Court of Appeal of Northern Ireland are binding on the courts of Northern Ireland. England has its own courts, its own decisions, its own "common law." Decisions of the House of Lords on appeal from the Court of Appeal of England form part of the English "common law," not of Northern Ireland "common law," and are not binding on the courts of Northern Ireland. On the other hand, acceptance of the common law as an integrated set of principles, without any acceptance of any "brooding omnipresence in the sky," leads to a contrary conclusion. There is one common law. Different courts may come to different conclusions about the development of this dynamic, living system. But where a doctrine of precedent exists and a principle of the hierarchy of courts, there is no difficulty in accepting the highest court's decisions about the common law as authoritative, even though there are in theory two Houses of Lords.[15] In fact the courts have adopted a practice with regard to precedents without consideration of such arguments. The practice has been for English and Irish courts to consider themselves bound by decisions of the House of Lords on points of common law whether the House of Lords was sitting on appeal from an Irish or an English court. Who has ever expressed doubts, from this

[12] There are, of course, the questions whether decisions of the House of Lords on appeals from the Court of Session are binding elsewhere than in Scotland, and whether decisions of the House of Lords on appeals from the Court of Appeal of England and Northern Ireland are binding on Scottish courts. But Scotland is not a "common law" country, and so very different considerations apply.

[13] (1938) 304 U.S. 64. It is submitted that the rejection of an alternative view does not lead, as Holmes J. proclaimed it did in *Black & White T. & T. Co.* v. *Brown & Yellow T. & T. Co.* (1927) 276 U.S. at 534, to the adoption of "a transcendental body of law outside of any particular State."

[14] *Cf.* Holmes J., *Kuhn* v. *Fairmont Coal Co.* (1909) 215 U.S. at p. 372. "The law of a state does not become something outside of the state court and independent of it, by being called the common law. Wherever it is cited it is the law as declared by the state judges and nothing else."

[15] It may well be contended, of course, that there is but one court both for England and for Northern Ireland.

point of view of the hierarchy of the courts, about the authority in England of the decisions of the House of Lords in *Cundy* v. *Lindsey*, *Quinn* v. *Leathem*, *McCartney* v. *Londonderry and Lough Swilly Ry. Co.*? [16] The doctrine behind the practice, however, has hitherto existed *sub silentio*. There are now dicta which can be quoted. In *Walsh* v. *Curry* each member of the Court of Appeal of Northern Ireland used language which, though it does not explicitly state, nevertheless expressly recognises, the doctrine that "decisions" of the House of Lords, though on appeal from English courts, are binding in Northern Ireland. Each judge said that the House of Lords in *Wimpey's* case might have laid down a rule of law which would have been binding on him. Thus Lord MacDermott L.C.J. considers whether "the construction adopted by the majority in the Court of Appeal has not been conclusively established by the House of Lords." [17] Porter L.J. though apparently in favour of "the interpretation put upon the paragraph by Denning L.J. in the Court of Appeal and by Lord Porter and Lord Keith in the House of Lords," [18] nevertheless was unable to adopt it, because "The majority of the House of Lords . . . took a different and narrower view of the scope of the paragraph." [19] Black L.J. said "Unfortunately, as the Lord Chief Justice has pointed out, the decision in the House of Lords does not give us authoritative guidance." [20] If that reason had not existed the decision would have presumably been binding.

The reason stated by Lord MacDermott L.C.J. why the House of Lords in *Wimpey's* case had not "conclusively established," gave no "authoritative guidance" for, a rule of law was that the members of the House of Lords expressed different opinions about the correct interpretation of the relevant statute. Lord MacDermott L.C.J. did not seek for some *ratio decidendi*, as Goodhart advises, by looking merely at "the material facts of the case plus the decision thereon." [21] He carefully considered the *ratio decidendi* of each speech. He said "The House of Lords affirmed the decision of the Court of Appeal. This was a majority ruling, Lord Simonds, Lord Reid and Lord Tucker taking the view that the appeal of *Wimpey's* should be dismissed and Lord Porter and Lord Keith of Avonholm being of the contrary opinion." He then proceeded to examine carefully the speeches of the Law Lords to see on what principles of law they based their decisions. It is clear that had all the members of the majority of the Lords agreed as to the interpretation of the statute, he would have considered himself

[16] All of these were "Northern Ireland" cases.
[17] [1955] N.I. at p. 125, line 5. The line numbers printed on each page by the *N.I. Reports*, the letters printed by the *All England Reports*, are most valuable. They save the search through an entire page for a particular sentence.
[18] [1955] N.I. p. 129, line 34.
[19] [1955] N.I. p. 130, line 6.
[20] [1955] N.I. p. 135, line 8.
[21] See n. 7.

bound by that interpretation, being the rule of law on which they had based their decisions. He found, however, that the majority were not agreed, for Lord Reid, though he came to the same ultimate decision, did not accept the interpretation adopted by Lord Simonds and Lord Tucker. Since the minority also rejected that interpretation Lord MacDermott did not consider it was "binding on this court."[22] He concluded the question of the authority of the House of Lords by saying "For these reasons I think this court is in a position to form its own judgment on the matter."[23]

Enough has been said to show that *Walsh* v. *Curry* is an authority for rejecting the thesis that the *ratio* propounded by the judge is not authoritative. But, as has often been pointed out, the classical view leads to many difficulties of application, particularly where multi-judge tribunals are concerned.[24] *Walsh* v. *Curry* deals with one of the problems. As has been seen, Lord Simonds and Lord Tucker in *Wimpey's* case adopted one interpretation of the relevant section: Lord Reid adopted another. Lord Porter and Lord Keith, like Lord Reid, rejected the interpretation of Lord Simonds and Lord Tucker, but adopted yet another interpretation, leading to a different final order from that of the others. There were thus three judges in favour of rejecting the interpretation of Lord Simonds and Lord Tucker: they formed a majority of the House on that point. Lord MacDermott L.C.J. thought that he was in consequence not bound to accept the interpretation of Lord Simonds and Lord Tucker, even though they formed part of the majority of the House. On the other hand, he did not think that he was bound to reject their interpretation, even though on that point they were in a minority. The reason for this latter view was that "so to hold would be to reckon the views of the minority on which their dissent was founded."[25] Honoré has stated a *rationale* for this dictum. "The fundamental reason why the opinions of minority judges cannot form part of the *ratio decidendi* of a case is that they are not reasons for the order made by the court: a *ratio decidendi* is entitled to authority not as the opinion of one or more judges,

[22] [1955] N.I. p. 124, line 36. "I do not think it can be said that the view taken by Singleton and Morris L.JJ. in the Court of Appeal has been adopted by the House of Lords, for although the House of Lords affirmed the decision of the Court of Appeal, which was based on that view, the view itself did not find favour with the majority of the Law Lords. I say this because I have no doubt from what Lord Reid says that he did not share the view taken by Lord Simonds and Lord Tucker."

[23] [1955] N.I. p. 125, line 11. The sentence concludes "in the light, of course, of the opinions evoked by *Wimpey's* case." But this is a reference to persuasive, not to binding, authority.

[24] See Paton and Sawer, (1947) 63 L.Q.R. 462: Coutts (1948) 64 L.Q.R. 463: Lord Asquith 1950, J.S.P.T.L. 358.

[25] [1955] N.I. at p. 125, line 8.

but as the reason for a judicial order." [26] But this *rationale* is inconsistent with Lord MacDermott's reasoning. He did take into account the opinions of minority judges when seeking to determine the authority of *Wimpey's* case: he relied on the views of Lord Porter and Lord Keith to show that the interpretation of Lord Simonds and Lord Tucker had not been "conclusively established."

Lord MacDermott's reasoning leaves open the situation where though there is no unanimity in favour of a particular *ratio* there is no majority of the court against it. Thus, supposing the House in *Wimpey's* case had consisted solely of Lord Simonds, Lord Tucker and Lord Reid, would the view of Lord Simonds and Lord Tucker have been binding? Porter L.J. considered himself bound by their interpretation [27]: he did not, however, expressly take into account the fact that Lord Reid had not agreed with Lord Simonds and Lord Tucker.

The situation in *Walsh* v. *Curry* must also be distinguished from that where though there is no unanimity in favour of a particular *ratio*, yet there is no rejection of it. The opinions of the judges may be different but not inconsistent. Thus in a three judge court, J_1 and J_2 may hold for the plaintiff by relying on rule of law x, and J_3, without rejecting x, may not adopt it, but may find for the plaintiff by relying on rule of law y. It may well be that in such a case both x and y are binding.[28] If there are two further judges, J_4 and J_5, who reject both x and y and hold for the defendant, what is then the position? *Walsh* v. *Curry* is distinguishable, since in that case J_3 rejected x; this, indeed, was a vital factor in Lord MacDermott's judgment.[29] Accordingly, *Walsh* v. *Curry* cannot be cited for the general proposition laid down by the South African Appellate Division in *Fellner* v. *Minister*

[26] (1955) 71 L.Q.R. p. 198. An interesting case illustrating the difference, and the relation, between the reasons for a decision and the final order of a court is *Lake* v. *Lake* [1955] 2 All E.R. 538 (*cf. Commonweath of Australia* v. *Bank of New South Wales* [1950] A.C. 235, *per* Lord Porter at 294). While I agree with the substance of Honoré's statement, I would reaffirm that it is more convenient to use the phrase *ratio decidendi* solely for the rule of law propounded by the judge. In this terminology one would not speak of "the *ratio decidendi* of a case," or of a court, except as an elliptical way of referring to the *ratio decidendi* of a single judge constituting a court, or to the *rationes decidendi* of the judges of a multi-judge tribunal where they all propounded the same rule. This terminology may be correlated with Honoré's own view that "The notions of a *decision* and a *reason for a decision* apply primarily to individuals": (1955) 71 L.Q.R. 201. He includes "a decision" in his statement; but the decision of a court is a perfectly clear notion: it is the final order of the court: see Lord Porter in the *Commonwealth Banking* case.

[27] [1955] N.I. p. 130, *passim*.

[28] This would follow from the analogy of *Jacobs* v. *L.C.C.* [1950] A.C. 361. Viscount Dunedin's speech in *G.W.R.* v. *The Mostyn* may be regarded as supporting this conclusion, because he thinks that a majority *ratio* is binding. See [1928] A.C. at p. 73.

[29] [1955] N.I. p. 124, line 41. A very large number of possibilities exist, and are actualised. The doctrine of precedent is far too complex for effective operation: it persists because its complications are overlooked.

of the Interior.[30] This is that in a five judge court "there is no *ratio decidendi* of the court unless at least three judges propound the same *ratio decidendi*." Indeed the judgment of Porter L.J. is opposed to such a wide doctrine.

Lord MacDermott's view that the court was not bound either to accept or reject the interpretation of Lord Simonds and Lord Tucker led him to say "this court is in a position to form its own judgment on the matter." This dictum might be interpreted to mean that the court was free to adopt any construction of section 16 it pleased. This would be to wipe *Wimpey's* case "off the slate,"[31] save for the persuasive authority of the speeches. In fact, all the members of the Court of Appeal adopted the interpretation of Lord Simonds. It is certainly not clear that Lord MacDermott considered himself free to adopt an interpretation which, applied to the facts of *Wimpey's* case, would have led to a contrary result in the House of Lords.

J. L. Montrose.*

[30] [1954] (4) S.A. 523 (A.D.). The quotation is taken from the note by Honoré in 71 L.Q.R. p. 196. The shift in the meaning of "*ratio decidendi*" is interesting.

[31] This is what Viscount Dunedin said could not be done with a decision of the House of Lords.

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CONDITIONAL PARDONS AND THE COMMUTATION OF DEATH SENTENCES

WRITING at the beginning of the present century, Sir Frederick Pollock observed that "most laymen and some lawyers would be puzzled to give an account of the manner in which the proceeding commonly, but not with strict accuracy, called commutation of capital sentences is legally justified."[1] At that time, the law on the matter was pretty well understood by those who had to administer it in practice. In the course of the present century, however, there have been some indications that the officials who have been concerned with the matter have misconceived the extent of their powers. The purpose of this essay is to restate the law as briefly as the subject permits.

A few years before Pollock made the observation referred to, Maitland stated the position with his usual felicity of language. He was discussing the royal prerogative, and after noting that "the king can pardon a crime, either absolutely or upon condition,"[2] he said—"The king has no power to commute a sentence. When we hear of sentences being commuted, what really happens is that a conditional pardon is granted: a condemned murderer is pardoned on condition of his going into penal servitude. It is a nice question whether he might not insist on being hanged."[3] Save that it is now possible to give a definite answer to the "nice question," these remarks are as valid today as they were seventy years ago.

It will be noted that both Pollock and Maitland refer to "commuting" a sentence in language which indicates that "commutation" is a practice which is not recognised by the law. What is meant by "commutation" is the substitution of a punishment of a different character for that which has been awarded by the court. Commutation must be carefully distinguished from "remission," which is the reduction of the amount of a sentence or penalty without changing its character.[4] Another term which is frequently used in connection with the "commutation" of death sentences is "reprieve"; this, however, is no more than a temporary postponement of the execution of a sentence imposed by the court. In England, it is used as the first step in "commuting" a death sentence. A reprieve may be granted by order of the

[1] The Revised Reports, Vol. 48, preface, at p. vi.

[2] Maitland, *The Constitutional History of England*, 476. This work is a posthumous publication, under the editorship of H. A. L. Fisher, of a course of lectures delivered by Maitland in 1887–1888.

[3] *Ibid.*, 480.

[4] Newsam, *The Home Office*, 114.

Home Secretary under his own hand [5]; as a conditional pardon is a formal document the preparation of which takes some time, a reprieve is usually granted while it is being prepared.

There is a great deal of learning to be found in the old books and cases on the subject of the prerogative of pardon.[6] That the king had the power to temper justice with mercy was never disputed in principle; but the precise extent of this power, and the effect of its exercise, occasioned much discussion. Much of this is not germane to the present inquiry. But certain basic points emerge from it which must be borne in mind.

First, a pardon, to be effective at common law, had to be granted under the Great Seal. Secondly, the courts would not take judicial notice of a pardon; if the grantee intended to rely upon it in legal proceedings, he had to plead it specially. In connection with this principle, rules were developed as to the stage of proceedings at which the pardon had to be pleaded. A grantee who failed to plead his pardon at the appropriate stage could be held to have "waived the pardon" and to be precluded from pleading it at a later stage.[7]

Thirdly, from an early period attempts were made to impose restrictions on the exercise of the prerogative of pardon. An Act of 1328 restricted the right to grant pardons in cases of "Manslaughters, Robberies, Felonies, and other Trespasses." [8] Eight years later these restrictions were confirmed by another Act, which

[5] *Ibid.*, 114. The power of reprieving also belongs to, but in practice is not exercised by, the judges.

[6] The following are the main sources which I have consulted: 3 Inst. Chap. 105; 4 Bl.Comm. Chap. 31; Hawkins P.C. Bk. 2, Chap. 37; Bro.Abr., Charter de Pardone; Rolle Abr., Prerogative le Roy; Com.Dig., Pardon; Bac.Abr., Pardon; Viner Abr., Prerogative of the King; *Coles Case* (1597), Moore K.B. 466, 72 E.R. 700; *Sir Henry Lindeleves Case* (1601), Noy 31, 74 E.R. 1001, reported *sub nom. Sir Henry Linley's Case*, Cro.Eliz. 814, 78 E.R. 1040; *Sir Matthew Mints' Case* (1640), Cro.Car. 596, 79 E.R. 1113; *Howard's Case* (1661), 1 Sid. 41, 82 E.R. 957, also reported in 1 Keb. 9, 19, 108, 83 E.R. 778, 785, 842, and T.Raym. 13, 83 E.R. 7; *Copeland's Case* (1665) Kel. 45, 84 E.R. 1075; *Roy* v. *Webster* (1670), 1 Sid. 452, 82 E.R. 1212; *The Case of the Lord C.* (1676), T.Jo. 54, 84 E.R. 1144; *Cooke's Case* (1690), Carth. 120, 90 E.R. 675, also reported in Holt K.B. 519, 90 E.R. 1185; *R.* v. *Parsons* (1691), 1 Show.K.B. 283, 89 E.R. 575, also reported in 2 Salk. 499, 91 E.R. 428; *Dr. Groenvelt's Case* (1697), 1 Ld.Raym. 213, 91 E.R. 1038; *The King* v. *Beaton* (1764), 1 Black.W. 479, 96 E.R. 277; *The King* v. *Maximilian Miller* (1772), 2 Black.W. 797, 96 E.R. 468, also reported in 1 Leach 74, 168 E.R. 139; *The King* v. *Patrick Madan* (1782), 1 Leach 223, 168 E.R. 214; *The King* v. *Aickles* (1785), 1 Leach 390, 168 E.R. 297; *Bullock* v. *Dodds* (1819), 2 B. & Ald. 258, 106 E.R. 361; *The Queen* v. *Baker* (1837), 7 Ad. & El. 502, 112 E.R. 559; *Case of Leonard Watson and Others* (1839), 9 Ad. & El. 731, 112 E.R. 1389. There is a fuller report of the arguments in the latter case in 3 St.Tr.N.S. 963 *et seq.*, *sub nom. The Canadian Prisoners' Case*, *1839*. The use made of conditional pardons in connection with transportation is also discussed in Holdsworth, *History of English Law*, xi, 568–575; and Craies, *The Compulsion of Subjects to Leave the Realm*, (1890) 6 L.Q.R. 388.

[7] These rules as to pleading applied only to pardons under the Great Seal; if the pardon were included in a statute giving a general pardon for all offences of a certain kind—*i.e.*, an amnesty Act—the rules did not apply, for the courts were of course bound to take judicial notice of statutes.

[8] 2 Edw. 3, Stat. Northampt., c. 2.

went on to provide that those who were granted pardons in such cases must within three months of the grant appear before the sheriffs and coroners of the counties where the felonies were committed and find six "good and sufficient" mainpernors [9] for their future good behaviour; the mainprise was to be returned into Chancery within a further period of three weeks. If it were not found, or if the grantee subsequently broke the peace, the pardon became void.[10] This statute, which curiously enough did not apply to pardons for treason, resulted in a procedure which figures largely in the cases. Where the grantee of a pardon which came within the Act pleaded it, the court would not recognise or "allow" it unless he produced a "writ of allowance" from the Chancery confirming the finding of the mainprise. He had to plead the pardon while kneeling as a token of his gratitude for the mercy extended to him, and when the court allowed it and discharged him he had to present gloves to each of the judges.

The procedure by way of writ of allowance was sometimes avoided by it being specified in the pardon that the grantee need not find mainprise, *non obstante* the statute. This use of the royal dispensing power—which was apparently first introduced into English law by Henry III in about the year 1252 [11]—was fairly common. The dispensing power itself disappeared after the enactment of the Bill of Rights,[12] and shortly afterwards the Act of 1336 was repealed, since felons were finding it difficult to provide the mainprise required. The repealing Act allowed the judges before whom a pardon for felony was pleaded to remand the grantee to prison until he entered into a recognisance, with two sufficient sureties, to be of good behaviour for a period not exceeding seven years.[13] It was, however, in the judges' discretion whether or not to exercise this power, and some fifty years later we are told that there was no precedent for any exercise of it.[14]

Although the authorities, from the earliest times, state clearly that the king may annex to a pardon whatever conditions he pleases, there do not seem to be any indications that the granting of conditional pardons became a common practice before the seventeenth century. Of course, the effect of the 1336 statute was to make all pardons for felony conditional in one respect (that of finding mainprise), unless a *non obstante* clause were included. And the statute itself laid down the consequences of a breach of condition. This fact may well have been of importance in connection with the rules which shortly after the Restoration began

[9] *i.e.*, sureties for their appearance to answer charges: 3 Bl.Comm. 128.
[10] 10 Edw. 3, st. 1, cc. 2, 3.
[11] See 2 Rolle Abr. 179 (X).
[12] 1 Will. & Mar., Sess. 2, c. 2, s. 12 (1689). This section envisaged the enactment of a further statute in the same session which would regulate the future use of the dispensing power, but no such statute was enacted, and the dispensing power accordingly lapsed.
[13] 5 & 6 Will. & Mar. c. 13 (1694).
[14] *R.* v. *Chetwynd* (1744), 2 Stra. 1203, at p. 1205, 93 E.R. 1129, at p. 1130.

to be developed by the courts regarding conditional pardons of another kind.

The founding of the American colonies in the reign of Elizabeth I raised the problem of populating the newly acquired territories. Not unnaturally, the government saw that it had an excellent opportunity of killing two birds with one stone; it could both populate the colonies and get rid of some of its unwanted criminals by sending them there. But it had no power to force its subjects to go. The first power of this kind was conferred by an Act passed at the end of the sixteenth century.[15] This provided, *inter alia*, that certain persons who had been declared to be rogues and vagabonds and who appeared to be dangerous might be committed to Quarter Sessions, who could banish them to " such parts beyond the seas " as might be assigned by the Privy Council. It was also provided that to return from such banishment without licence or warrant should be felony punishable with death.

After the Restoration, statutes providing for compulsory banishment or transportation to the colonies became more common. Thus in 1662 we find an Act of this kind dealing with Quakers [16]; in 1666 it was enacted that convicted moss-troopers (*i.e.*, bands of thieves and robbers who at that time were ravaging the northern counties of England) could be transported,[17] and by two Acts of 1670 [18] the same penalty was made available for those convicted of certain kinds of theft or malicious damage. That these statutes were regarded by the people as an innovation is reflected in the action of the master of a certain ship on which there had been put a number of Quakers sentenced to transportation under the 1662 Act. He put them ashore again on the Downs, for " he judged it contrary to the laws of England to transport men without their consent "; and in due course the Privy Council sent for him to answer for his contempt and offence.[19]

These statutes dealt only with specified types of criminals. But at the same time a practice sprang up which was applied to all felons under sentence of death. They could petition the king for a pardon on condition of their agreeing to transport themselves to the colonies either for life or for a specified term. The usual procedure was for the king, if he were willing to grant a pardon on these terms, to require the felon to enter into a bond himself, and also to provide sureties, for his transportation.[20] But difficulties soon began to make themselves felt. One of these was the delay which inevitably attended the passing of a pardon under the Great Seal. Another, and far more serious, one was the problem

[15] 39 Eliz. 1, c. 4 (1597).
[16] 14 Car. 2, c. 1.
[17] 18 Car. 2, c. 3.
[18] 22 Car. 2, c. 5; 22 & 23 Car. 2, c. 7.
[19] Calendar of State Papers, Colonial Series, America and West Indies, 1661–1668, 1664, nos. 858, 872.
[20] *Ibid.*, 1666, nos. 1268, 1289. And see *Copeland's Case*, n. 6, above.

of dealing with a convict who either failed to go abroad or returned to England prematurely. True, his bond, and those of his sureties, could be enforced; but this remedy was plainly insufficient. The judges appear to have been willing to hold that in either of the events specified the condition on which the pardon had been given was broken, and that accordingly the pardon ceased to have effect, with the result that the offender was remitted to his original punishment of death.

It is difficult, however, to see how they reached this result. Let us assume—and it is certainly not so plain as to be free from doubt—that the conditions attached to the pardon were conditions precedent and not subsequent. In that event a failure to observe the conditions would nullify the grant of pardon. But the conditions attached to the pardon had in fact been observed; the convict had entered into the bond and given security. The real complaint was that he had broken, not a condition of the pardon, but a condition of that condition. It is difficult to see how such a breach could nullify the grant. Nevertheless, the judges held that it did, and they were perhaps persuaded to so hold by analogy to the provisions of the old statute of 1336.

These problems were fairly soon alleviated by the action of the legislature. The Piracy Act, 1717,[21] provided that whenever the king was willing to extend mercy to a convicted felon on condition of transportation to America, his intention so to act might be signified by a Secretary of State, and thereupon the court could allow the offender the benefit of a pardon under the Great Seal and order his transportation for the appropriate term. It was further provided that an offender so dealt with who returned prematurely from transportation should be liable to the death penalty. Two years later, it was found necessary to pass another Act[22] empowering a subsequent court, having the like authority to that which convicted the offender, to make the transportation order. These efforts exhausted the legislature, and no further statute on the subject was passed for fifty years. During that period, the difficulty arose that if the king's intention of mercy were not signified during the assizes (so as to enable the Piracy Act procedure to be used), the offender had to stay in prison until the next assizes (that is, the next court of like authority) was held, when he could be dealt with under the Act of 1719. This additional imprisonment was, however, not counted as "time served" under the condition of the pardon.

In 1768 the legislature dealt with this problem by empowering the judge who had tried the offender to make an immediate order for transportation on being notified of the king's intention of mercy by a Secretary of State.[23] Even this did not solve all the problems,

[21] 4 Geo. 1, c. 11.
[22] 6 Geo. 1, c. 23.
[23] 8 Geo. 3, c. 15.

and the Act was repealed and replaced in due course by the Transportation Act, 1824,[24] which provided that *any* judge might make the order for transportation. By this time, the problem of finding suitable places to which convicts might be transported was raising itself in an acute form. The Transportation Act, 1830,[25] accordingly allowed the condition in a pardon to be one of undergoing a term of imprisonment instead of one of transportation. It was followed by the Penal Servitude Act, 1853,[26] which substituted penal servitude for transportation. All these provisions were swept away by the Criminal Justice Act, 1948,[27] which in one short section (69) provides for the commutation of a death sentence to one of imprisonment by means of conditional pardon.

Thus, over a period of three centuries, the procedural difficulties were gradually overcome. But the original method of using a conditional pardon to commute a death sentence, doubtless devised *ad hoc* to deal with the problem of peopling the colonies in the seventeenth century, has never been abandoned. At no time has the legislature seen fit to grant to the Crown the power to commute a death sentence by simply substituting for it another form of punishment recognised by law. We can only speculate as to the reasons for the failure to grant this power. The results of the failure are susceptible of more precise investigation, and to this task we may now turn.

On April 20, 1854, the law officers, Sir Alexander Cockburn and Sir Richard Bethell, were consulted by the government as to the propriety of an act of the Governor of Barbados. It appears that a prisoner convicted of manslaughter had been sentenced by the colonial court to transportation for life. The Governor purported to commute this sentence to one of nine years' imprisonment. Under the local law, the maximum term of imprisonment which could be imposed was four years, and the prisoner's counsel accordingly made representations on his behalf to the home government. On May 3, 1854, the law officers advised that the commutation was illegal. They said—

> "The Crown has no power, except when such a power is expressly given by Act of Parliament, to commute a sentence passed by a court of justice. Practically, indeed, commutation of punishment has long taken place under the form of conditional pardons. For the Crown, having by the prerogative the power of pardon, may annex to a pardon such conditions as it pleases. Thus, for offences for which the punishment was death, where it was not deemed advisable to carry the sentence of death into execution, the course, from an early period, was to grant a pardon on condition of the convict being transported to some settlement or plantation.

[24] 5 Geo. 4, c. 84.
[25] 11 Geo. 5 & 1 Will. 4, c. 39.
[26] 16 & 17 Vict. c. 99.
[27] 11 & 12 Geo. 6, c. 58.

> "But this could only be done with the consent of the felon. The Crown cannot compel a man, against his will, to submit to a different punishment from that which has been awarded against him in due course of law.
>
> "The sentence of transportation passed in the present case cannot, therefore, be changed into one of imprisonment, unless the substituted punishment be assented to by the prisoner as a condition of the remission of the sentence of transportation." [28]

They went on to say that even if the sentence of transportation were legally commuted to one of imprisonment, the term should not be greater than the four years' maximum available under the local law. In a further opinion dated July 5, 1854, they advised that as the purported commutation was null and void, the original sentence of transportation could be legally carried into execution; but that the convict should be given the option of accepting in lieu thereof a commuted sentence of four years' imprisonment with hard labour [29]—an offer which he no doubt gratefully accepted.

The legal reputations of Cockburn and Bethell are such that their opinion must command the greatest respect. And this is the more so when, as in the present instance, the opinion conforms to the accepted principles of English constitutional law. Nor, indeed, am I aware of any serious questioning in England of the rule thus stated until the year 1936.[30] In that year A. B. Keith, in *The King and the Imperial Crown*, stated, in discussing conditional pardons, that "it is for the Home Secretary to decide conditions, and the prisoner has no longer the option of refusal." [31] He cited no authority in support of this statement. Four years later, in *The Constitution of England from Queen Victoria to George VI*, he wrote that "the [Home Secretary] alone may commute a death sentence to imprisonment and reduce other sentences by remitting fines, altering the term of imprisonment, etc. The prisoner has no option but to accept the changed sentence, if within the legal authority of the Crown." [32] The learned author unfortunately omitted to explain what he meant by the cryptic qualification which he now appended to his earlier opinion, and I must confess my inability to offer any interpretation thereof. But he did see fit, on this occasion, to cite an authority, namely a footnote to yet a third book by himself, *The Dominions as Sovereign*

[28] Forsyth, *Cases and Opinions on Constitutional Law*, 463.

[29] *Ibid.*, 463–464.

[30] In his book *The Home Office*, published in 1925, Sir Edward Troup recognises the general rule that a conditional pardon can take effect only with the express or implied consent of the person pardoned. In a somewhat obscure passage, however, at pp. 55–56, he seems to suggest that the general rule does not apply if the machinery of commutation by way of conditional pardon set up by the Transportation Act, 1824, the Transportation Act, 1830, and the Penal Servitude Act, 1853, is used. If this is a correct interpretation of what he wrote, he clearly misunderstood the purpose and effect of those statutes.

[31] *Op. cit.*, 337.

[32] *Op. cit.*, i, 132.

States, published in 1938.[33] In this footnote he says that "it has been ruled in Canada that a pardon cannot be refused, even if given in order to secure deportation." The two cases cited in support are *Re Royal Prerogative of Mercy*,[34] and *Re Veregin*.[35] These must now be examined.

The second of these cases was in fact the earlier in point of time. It appears that Veregin was an alien who had been sentenced to a term of imprisonment. The Crown remitted part of his term and made an order for his immediate deportation under section 43 of the Immigration Act; this section permitted the Minister, by order, to deport an alien who had become an inmate of a gaol, after his term had expired. Veregin sought to avoid the enforcement of the deportation order on the ground that the term of imprisonment to which he had been sentenced by the court had not expired, and that the order was accordingly invalid. Mellish J., of the Supreme Court of Nova Scotia, upheld his claim. He held, first, that a remission of sentence could not in these circumstances be forced on an alien prisoner, who had a right, if he chose, to take the limit of time allowed him before deportation. He further held that the release of Veregin amounted to a pardon of his offence and that the pardon involved freedom from deportation.

This decision was clearly embarrassing to the Canadian Government, and shortly afterwards the Governor General in Council addressed four interrogatories to the Supreme Court of Canada, which heard argument thereon and then gave a unanimous opinion.[36] The first of the interrogatories was: "Is it competent to the Governor General in the exercise of His Majesty's royal prerogative of mercy, to release from prison without his consent a convict undergoing sentence for a criminal offence (a) conditionally, (b) unconditionally?"

In dealing with this question, the court first considered whether an unconditional release from prison necessarily implied a pardon of the offence or could be limited to a release only from execution of judgment. After noting that the former view had been adopted in the United States,[37] they held that according to the common law the effect of a pardon as regards the offence is a question of intention.[38]

They then turned to the details of the first interrogatory, and said—

> "The Interrogatories speak of releases which are conditional and releases which are unconditional. In the case of a conditional release, the condition may be of such a character as

[33] The footnote referred to is n. 2 on p. 414 of the book.
[34] [1933] S.C.R. 269.
[35] [1933] 2 D.L.R. 362.
[36] *Re Royal Prerogative of Mercy* [1933] S.C.R. 269 (Duff C.J. and Rinfret, Lamont, Smith, Cannon and Crockett JJ.).
[37] *Hoffman* v. *Coster* (1837), 2 Whart. 453; *Jones* v. *Harris* (1846), 1 Strob. 160.
[38] [1933] S.C.R. 269, at p. 271.

to involve the voluntary act of the convict himself. In other words, such that the performance of it can only be effected with the consent of the convict. We assume from the course of the argument before us that the real purpose of the Interrogatories is to elicit the opinion of the court, as to the effect, in respect of the matters set forth therein, of a release from prison of a convict before the expiration of the term of imprisonment imposed by his sentence in pursuance of a valid exercise of the royal prerogative; and it would serve no useful purpose in these circumstances to explore the various hypotheses suggested by the term 'conditional release'; and we beg the leave of Your Excellency to limit our answers accordingly.

"Interrogatory numbered one we shall treat as addressed to the question whether or not the act of clemency in releasing a convict from prison prior to the completion of the term of his sentence may be valid and effective in law without the consent of the convict. The answer to the interrogatory so put is in the affirmative." [39]

The court went on to discuss the nature of a pardon, and after citing a number of opinions on the matter they expressed their agreement with the following remarks of Holmes J.—"A pardon . . . is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." [40] It would be inconsistent with this view, they said, to regard an unconditional pardon as in the same category, in point of law, as an act of benevolence proceeding from a private person. They continued—

"We do not think the authorities require us to hold that an unconditional pardon of an offence can take effect only upon acceptance by the grantee; and that, for example, a convict under the capital sentence can, in point of law, insist on being hanged, so that the only escape from such a result is by statute or by a colourable and unconstitutional exercise of the prerogative in granting successive reprieves."

It had been argued that a remission of sentence could not be effected otherwise than by means of conditional pardon requiring the consent of the prisoner. The court rejected this contention and held that a remission of sentence amounted to an unconditional pardon. They added—

"Moreover, the statements in the books to the effect that a conditional pardon is operative only with the consent of the grantee are illustrated by references to cases in which the condition is in the nature of a substituted punishment. At common law, the King cannot commute the sentence of the court by the substitution of another and different penalty, because he has no power at common law to compel the convict, against his will, to submit to a punishment which has not

[39] *Ibid.*, at pp. 271–272.
[40] *Biddle* v. *Perovich* (1927), 274 U.S. 480, at p. 486.

> been imposed upon him by a court of law. (See the opinion of Sir A. E. Cockburn and Sir Richard Bethell, May 3, 1854, Forsyth, 462, 3.) Obviously, in the simple case of a partial remission, which is, in terms, unconditional, the convict is not subjected to any penalty or punishment beyond that which the sentence of the court has awarded against him. We do not pursue the discussion further." [41]

The court then turned to the remaining interrogatories, and disposed of the inconveniences caused by Mellish J.'s judgment [42] by holding that a convict whose sentence has been wholly or partly remitted is one whose term has expired within the meaning of section 43 of the Immigration Act. They further held that a remission of sentence by way of pardon does not of necessity wipe out the offence, so that such a convict could be deported as being an undesirable alien under the machinery provided by section 42 of the Act.

The result reached by the court accords, it is submitted, with both authority and common sense. It would be absurd to hold that the Crown is bound to execute in full every sentence passed on a convicted criminal. An unsuccessful defendant in a civil case cannot compel the plaintiff to levy execution against him; why should it be supposed that an unsuccessful defendant in a criminal case should be in a better position? The only basis for such a supposition lies in those early authorities which refer to a prisoner as having "waived his pardon." But although this phrase at first sight appears to suggest that a prisoner can refuse an unconditional pardon, it clearly meant no more than that he had failed to plead the pardon and the court would not take judicial notice of it.

Indeed, there is some authority, albeit *sub silentio*, before the Canadian case was decided, to the effect that an unconditional pardon is effective without acceptance by the grantee. In *R.* v. *Boyes* [43] a witness for the Crown who claimed the privilege against self-incrimination was handed an unconditional pardon under the Great Seal. Although plainly reluctant he was thereupon compelled by the trial judge to testify, and the accused was convicted. His counsel thereupon moved for a new trial on the ground that the witness had been wrongly compelled to answer. The case was argued twice before the Queen's Bench, which was at that time staffed by Cockburn C.J. and Wightman, Crompton, Hill and Blackburn JJ., but a new trial was refused. It is surely significant that although counsel for the prisoner clearly advanced every argument which seemed to them tenable against the compulsion of the witness to testify, it did not occur to them to suggest that he was entitled to refuse the pardon.

The case of a conditional pardon is quite different. Here the Crown wishes to subject the prisoner to certain penalties or

[41] [1933] S.C.R. 269, at pp. 273–274.
[42] *Re Veregin* [1933] 2 D.L.R. 362.
[43] (1861) 1 B. & S. 311; 121 E.R. 730.

restrictions which differ from those to which the court, by its sentence, has subjected him. We may well ask, why should it be supposed that the Crown has such a power? There is no authority for it; both principle and such authority as there is, in the common law countries of the British Commonwealth, are against it. The one dissentient voice is that of Keith, who apparently bases himself on the two Canadian cases we have discussed. But upon investigation it turns out that the Supreme Court of Canada, so far from supporting Keith's view, plainly denied its validity.

Before we leave the authorities, however, we must briefly glance at the course of decision in the Supreme Court of the United States. As long ago as 1833, Marshall C.J. speaking for the court, laid it down that a pardon may be rejected by the person to whom it is tendered.[44] The court reiterated this doctrine in 1915, when it held that a witness could decline to accept an unconditional pardon tendered with a view to disentitling him to claim the privilege against self-incrimination.[45] This pushed the "doctrine of acceptance" to a point to which the Queen's Bench had some forty-five years earlier tacitly declined to be led. Then, in 1927, the pendulum swung right back when Holmes J., speaking for the court, held that the President's power to pardon conferred on him a power to commute a death sentence to one of life imprisonment without the consent of the convict.[46]

I approach the task of criticising an opinion of the great American jurist with the utmost reluctance and diffidence. But I am bound to submit that on this occasion his reasoning is illogical and does not carry conviction. He begins by discussing the nature of the pardoning power, and as we have already seen holds that it is an act of State, not a private act of grace. He then points out, quite rightly, that a prisoner cannot refuse to accept a reduction of a term of imprisonment or of the amount of a fine. But if the prisoner's consent is not necessary in such cases, it is hard to see, he says, how it should become necessary in the case of commutation from death to life imprisonment, for by common understanding the latter is a less penalty than the former. It would be anomalous to hold that the President may grant a remission of a sentence of imprisonment or a fine but that he is bound "to permit an execution which he had decided ought not to take place unless the change is agreed to by one who on no sound principle ought to have any voice in what the law should do for the welfare of the whole."[47] For these reasons, he concluded, the principle of *Burdick* v. *United States*[48] should not be extended to the present case.

[44] *United States* v. *Wilson* (1833) 7 Pet. 150.
[45] *Burdick* v. *United States* (1915) 236 U.S. 79.
[46] *Biddle* v. *Perovich* (1927) 274 U.S. 480.
[47] *Ibid.*, at p. 487.
[48] (1915) 236 U.S. 79.

This is a curious argument. Like his predecessors on the court, the judge begins by analysing the nature of a pardon, and from the results of that analysis he ultimately draws his conclusion. The earlier judges held that a pardon is a private act of grace, which in their view implied a need for its acceptance by the grantee; Holmes holds that it is an act of State, and this in his view carries the indication that the grantee's assent is not required. It is, however, dangerous to reason in this way when dealing with legal problems. In so doing, Holmes was led to overlook the crucial question, which is, does the executive branch of government possess a power to imprison a man for life? Holmes never discussed this question. Instead, he set up a false dilemma—either the President can never pardon, conditionally or unconditionally, without the grantee's consent, or he always can do so. The action of the Supreme Court of Canada in refusing to be driven to make a choice between these two extreme positions was, it is submitted, a wise one.

It would appear that Holmes was prepared to make one qualification to his doctrine that pardons are self-enforcing; a conditional pardon is valid without consent, he says, at any rate when it substitutes a lesser penalty for that imposed by the court. But who is to decide which of the two penalties is the lesser? Is a moderate whipping a lesser penalty than a long term of imprisonment? Is a moderate fine a lesser penalty than a short term? In discussing this problem Holmes refers to the "common understanding." He is probably right in saying that most people regard life imprisonment as less than death; though it is strange to find it so unquestioningly assumed, in a country the bulk of whose citizens are at least nominally Christian, that death is the worst of all evils that can befall a man. But what is to be done, in cases of commutation of non-capital sentences, to ascertain the common understanding as to the relative severity of the original and the substituted punishment? Are the judges to act on their own views, on the assumption that these embody the common understanding? Or are they to postpone their decision in order to enable a Gallup poll to be taken?

In truth, the "inarticulate major premise" of Holmes J.'s decision is that the President *ought* to have power to commute death sentences. And to arrive at a decision that the President *has* such a power he was prepared to overthrow, in fact if not in theory, the earlier decision of the court. We may perhaps forgive him for his action when we reflect that the President's powers in this regard depend on the United States Constitution, which is notoriously difficult to amend. But we must, I submit, express disapproval of his final remarks, quoted above, which seem to suggest that a convicted prisoner is a man without rights, at the mercy of the public welfare. It is unguarded expressions of this kind which have in recent years led extremist critics (from

whose views I emphatically dissent) to see in Holmes a man whose opinions were not far removed from those which found favour with Adolf Hitler.

It is submitted that the law on this matter is quite clear—the Crown has not now, and never has had, the power to substitute a penalty of a different character from that imposed by the court, by means of conditional pardon, unless the prisoner consents to such substitution. Nor has it any power other than that of conditional pardon, by which such a substitution can be made. In saying this we are not, as Holmes thought, committed to holding that all pardons are ineffective without the grantee's consent. The true position in commutation cases is that the prisoner's consent is required, not to the grant of pardon, but to the performance of the conditions without compliance with which the pardon is, in terms, invalid.

Yet the practice of the Home Office disregards this rule of law. In 1925 the then Permanent Under-Secretary, Sir Edward Troup, wrote of the practice in terms which suggested that he thought the prisoner's consent to a conditional pardon to be no longer always necessary.[49] And the present holder of the office, Sir Frank Newsam, stated quite clearly in 1954 that the practice is to review every sentence of death whether or not any representations are made on behalf of the prisoner.[50] He states that the practice is of long standing, but unlike his predecessor he does not suggest that it is based on statutory authority.

It may be added that the change in machinery effected by section 69 of the Criminal Justice Act, 1948, does not appear to have altered the position. The section provides that "where His Majesty pardons any person who has been sentenced to death on condition that he serves a term of imprisonment, that person shall be deemed to have been sentenced by the court before which he was convicted to imprisonment for the said term." In other words, all that the section does is to provide a different machinery for commutations by means of conditional pardon from that which formerly existed under the Transportation Act, 1824. It does not touch the question of the validity of a conditional pardon without the prisoner's consent. It is surely beyond question that in saying that a person who has been conditionally pardoned is deemed to have been sentenced to a term of imprisonment the section is referring only to a person who has received a *valid* conditional pardon. The section is silent as to when a conditional pardon is valid; the law on that matter was settled long before 1948.

We might, of course, follow the example set by the judges of the seventeenth and eighteenth centuries in dealing with cases of alleged defamation and take the words of these two officials *in*

[49] See n. 30, above.
[50] Newsam, *The Home Office*, 114–115.

mitiore sensu.[51] We could then assume that although the Home Secretary reviews every death sentence as a matter of course, he does not take the step of recommending the grant of a conditional pardon without first assuring himself that the convict is willing to accept it. Unfortunately, however, there is not the slightest sign that the Home Office regards the convict's consent as being necessary. Indeed, had they so regarded it, they could not have acted as they did in the spring of 1948.

It will be remembered that at that time the Criminal Justice Bill was before the House of Commons, which amended it to include a trial abolition of capital punishment. On the third reading of the Bill the then Home Secretary, Mr. Chuter Ede, announced that in the interim period, while the Bill went before the House of Lords, he would as a matter of course advise His Majesty to commute all death sentences, by means of conditional pardon.[52] His action did not go unchallenged. It was roundly denounced as unconstitutional by Lords Simon and Goddard, and vigorously defended by Lord Jowitt, when the Bill was in Committee in the House of Lords.[53] When the Upper House threw out the capital punishment provision, the Home Secretary reverted to his former practice, and the matter was not carried any farther.

The Australian legislation dealing with commutation of death sentences closely follows the English pattern, with slight variations of wording.[54] The current English practice is almost certainly followed. It is well known that State Labour governments will not carry out the death penalty, and when they hold office they apparently automatically commute all death sentences. This action implies a belief that they have power so to act. It produces the appalling result that the fate of a convicted murderer may depend on the result of a forthcoming election. It is submitted that no government should accept office unless it is prepared to observe the law until such time as it is changed by the proper legal methods, and that in particular the royal prerogative should not be used to effect a temporary change in the law—*a fortiori* when the use made of the prerogative exceeds the legal limitations thereon.

It will no doubt be urged that no sane man would object to a commutation of his death to one of imprisonment even for life (it being generally known that the phrase " imprisonment for life " does not in practice mean what it says) and that the prisoner's

[51] See Holdsworth, *History of English Law*, viii, 355–356.

[52] 499 H.C.Deb. 1307 (5th series, 1948).

[53] 156 H.L.Deb. 111–112, 116–118, 137–140 (5th series, 1948). Lord Goddard characterised the Home Secretary's action as an attempt to exercise the obsolete dispensing power. This was probably a slip of the tongue for suspending power, but in either case it seems to put the point too high.

[54] New South Wales—Crimes Act, 1900, ss. 459, 460: Tasmania—Prison Act, 1868, ss. 49, 50: Victoria—Crimes Act, 1928, ss. 559–561: Western Australia —Criminal Code, s. 679. I have been unable to find any statutory provision in South Australia. Queensland abolished capital punishment in 1922, but until then its Criminal Code had the same provisions as that of Western Australia.

consent may therefore be assumed. But this assumption is unjustified. It is not unknown for a convicted murderer to wish to die.[55]

Moreover, in some jurisdictions where the conditional pardon procedure is used the prisoner may be in a strong bargaining position. In Victoria, for instance, there is no legislation analogous to the Sentence of Death (Expectant Mothers) Act, 1931.[56] Suppose a convicted murderess, sentenced to death, were found to be pregnant. On the view here advanced, she might well refuse to accept a pardon on condition of her undergoing life imprisonment and bargain for a commutation to, say, five years. For she could safely say to herself, where can the Minister be found who will recommend that I be hanged if I do not accept the conditions he offers?

Other problems suggest themselves. What is the legal position of a convict who has been sentenced to death and who is being held in prison to undergo a life term to which his death sentence has been commuted without his consent? Can he obtain his release by way of habeas corpus and/or obtain damages for false imprisonment? If the commutation followed representations made by him or by someone authorised to act on his behalf,[57] his consent could easily be implied; it would, I submit, be an unnecessary refinement to hold that a formal offer and acceptance of a conditional pardon must be made in every case. But what if no representations were ever made?

It might be argued that a prisoner who failed, after a reasonably short period, to take steps to obtain his release had by his inaction impliedly accepted the condition of the pardon. But there is the obvious difficulty that a man can hardly be taken to have accepted a condition unless he was aware that he had the option of refusing it.[58] If it be said that every man must be taken to know the law (a proposition which would in any case hardly encounter an enthusiastic reception), I reply that this argument could not be heard on behalf of Ministers who apparently do not know it (for it must surely be assumed that they are not consciously ignoring it). And it is worth noting that in *Biddle* v. *Perovich*[59] the U.S. District Court had granted a writ of habeas corpus in proceedings begun in 1925 by a prisoner whose sentence of death

[55] See the remarks of Lord Goddard C.J. in the case of *Rivett* (1950) 34 Cr.App.R. 87, at pp. 92–93.

[56] 21 & 22 Geo. 5, c. 24.

[57] Perhaps his solicitor would have an implied authority so to act.

[58] In 1842 the law officers, Sir Frederick Pollock and Sir William Follett, advising on the procedure for commutation of a death sentence passed by a court in Nova Scotia, said that the consent of the convict *in writing* to a conditional pardon should be obtained before the pardon was granted (Forsyth, *Cases and Opinions on Constitutional Law*, 461). This, it seems, supports the submission in the text that it would be unsafe for the Crown to rely upon an implied acceptance.

[59] (1927) 274 U.S. 480.

had been commuted sixteen years earlier. Holmes J., in delivering the judgment which led to the withdrawal of the writ, did not suggest that the prisoner's long acquiescence precluded him from obtaining it, although he remarked that there were difficulties in the way of the lower court's conclusion, without specifying what they were.[60]

Much might depend on the particular procedure for commutation adopted in the case in which relief is sought. One method, as we have seen, was for the Secretary of State to signify in writing that His Majesty was willing to extend mercy on conditions, and thereupon any judge could allow the prisoner the benefit of a conditional pardon and make the appropriate order for punishment in accordance with the conditions. Presumably the judge ought, before making the order, to satisfy himself that the prisoner accepted the conditions. It is submitted, nevertheless, that where this procedure has been adopted, a court from which the prisoner sought habeas corpus might well hold that he is being detained pursuant to an order of a judge acting within his jurisdiction and that as to the rest they must presume *omnia rite acta*.[61]

But that procedure may not have been adopted. One of the reasons which led to its being devised was the need for passing a conditional pardon under the Great Seal. Since 1827, that problem has been of no importance. By section 13 of the Criminal Law Act, 1827,[62] it has been made possible for the king to grant a conditional pardon to a convicted felon by warrant under the royal Sign Manual, countersigned by a Secretary of State. This, *on performance of the condition*, has the same effect as a pardon under the Great Seal. Since the Criminal Justice Act, 1948, abolished the procedure by way of judge's order, it would seem that this is the procedure now used.[63] And it was probably used even before that Act was passed.

In cases where it has been used, it would seem that a court could not but hold that the prisoner is being illegally detained. In that event, he would be remitted to his original position, *i.e.*, that of a person under sentence of death who had been reprieved. Theoretically the sentence might now be executed. But public opinion would scarcely tolerate this, at all events if the period of reprieve had been one of any length. Moreover, an opinion of the law officers, Sir William Horne and Sir John Campbell, though not precisely in point, suggests that the prisoner could be referred back to his original sentence only for the purpose of compelling an acceptance of the condition accompanying the pardon.[64] This, however, is not very helpful, as the learned counsel did not suggest

[60] *Ibid.*, at p. 485.
[61] *Cf.* the remarks of Grose J. in *The King* v. *Suddis* (1801) 1 East 306, at pp. 315–316; 102 E.R. 119, at p. 123.
[62] 7 & 8 Geo. 4, c. 28.
[63] See Newsam, *The Home Office*, 114–115.
[64] Forsyth, *Cases and Opinions on Constitutional Law*, 459–460.

what should be done if he still refused to accept. The same position would arise under the common law in a case, if there were any, where the prisoner has been granted a conditional pardon under the Great Seal.

The only other argument that might be advanced on behalf of the Crown is that a long course of practice has rendered the prisoner's consent no longer necessary. Even if this is qualified by saying that consent is not needed only in cases where the prerogative action is by common understanding beneficial to the prisoner, it still amounts to a claim that the royal prerogative can be extended by a course of practice.[65] Thus baldly stated, the proposition refutes itself. For upwards of three centuries it has been held that "the King hath no prerogative, but that which the law of the land allows him."[66]

Illegal action which has occurred in the past can be cured by an Act of Indemnity. The present case would, I submit, be a fit one for such action. And it would be reasonable for Parliament, at the same time, to grant to the Crown a power to commute death sentences in future without the convict's consent. But this would require that first the *de facto* dispenser of pardons, the Home Secretary, should come cap in hand to Parliament and himself ask for pardon. It is, I submit, proper that he should do so. In many respects the extent of the royal prerogative is still somewhat vague. But where its boundaries are sharply defined, as is the case with the prerogative of pardon, we should not suffer any attempt to extend those boundaries, however benevolent the motives of those who make the attempt. If we are tolerant of such encroachments, we take the first steps down a road which leads, in the end, to tyranny.

Peter Brett.*

65 Plainly, if prerogative action which formerly was limited by a need to obtain the consent of the subject is no longer thus limited, the prerogative has been extended.

66 *The Case of Proclamations* (1610) 12 Co.Rep. 74, at p. 76; 77 E.R. 1352, at p. 1354.

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MONOPOLIES LEGISLATION IN THE REPUBLIC OF IRELAND

THE most valuable comment on the first General Report of the Monopolies Commission appearing in this journal,[1] coupled with the enactment of the Restrictive Trade Practices Act, 1956, impels the present writer to make a brief incursion into the domestic law of a neighbouring State, in order to ascertain how the equivalent problems have been handled there.

In the Republic of Ireland, a policy of industrial protection, pursued by successive administrations since 1932, has produced a very special need for the promotion of internal competition wherever possible. This has resulted in efforts to stimulate in Irish industrial undertakings that element of risk which would tend to force those engaged in them to strive towards maximum efficiency and, on the whole, these efforts have met with more than moderate success. Like most other countries, however, the rapid advances in collective bargaining which have been made in recent years have resulted in the formation in Ireland of a considerable number of trade protection associations of employers in order to facilitate the negotiation of trade union–employer agreements: and one of the results of the formation of such groups has been to produce the kind of trading conditions that have led to the passing of the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, and the Restrictive Trade Practices Act, 1956.

By 1952, this tendency had become increasingly manifest, and towards the end of that year, a Restrictive Trade Practices Bill was introduced in the Irish legislature.[2] In the course of the debates on the Bill, the Minister for Industry and Commerce indicated that in spite of the claim by the Irish trade associations that no such legislation was necessary, there had been " a growing uneasiness " amongst the public as a result of the development and expansion of certain restrictive practices and of the realisation that there existed no machinery for investigating them. He defined " practices contrary to the public interest " as " practices which are designed to eliminate or restrict competition in the supply or distribution of any class of goods, or which operate to deprive the individual citizen of the right to engage in legitimate trade in any class of business," and he went on to say that his Ministry had been receiving an increasing number of complaints with regard

[1] B. S. Yamey, " First General Report of the Monopolies Commission," (1956) 19 M.L.R. 63.

[2] Dail Debates, October 21, 1952.

to the existence of such practices. This, he thought, revealed a situation where legislation had become urgently necessary, for where trade associations had taken power to exclude any persons from any trade, or imposed restrictions which had the effect of doing so, it should be recognised that they were assuming functions properly belonging to the legislature. Accordingly, the proposed remedial legislation was based on two principles: (a) Subject to the overriding policy of restricting imports by tariffs or quota arrangements in the interest of national economic development, the fullest and freest trade competition was in the public interest. (b) Where there were special conditions which might require some form of regulation, neither trade associations nor combinations of traders should be allowed to arrogate to themselves the right to impose such conditions or to limit competition.

In giving effect to this policy, the Irish legislature might have adopted a number of courses. One would have been to enact a general prohibition of "unfair practices," and to leave it to the courts (or a specially constituted tribunal) to determine whether a particular activity was illegal. Another would have been to declare unlawful certain specific and clearly defined practices, and to impose no restrictions outside the ambit of such practices. Yet another would have involved the adoption of a combination of these two courses, somewhat along the lines of the Act of 1956. None of these plans was adopted. Instead, the Bill in its final form [3] made provision for the establishment of a "Fair Trade Commission" which would carry out investigations into restrictive practices and would make recommendations to the Minister, who might or might not decide to act on them. If he did decide to act, he would have to satisfy the legislature that the practices in question were contrary to the public interest, and any prohibition order he might make would have to be implemented by statute.

The Irish Act of 1953 conforms to the following pattern—

1. In connection with any commodity, a Commission of not less than three and not more than five persons appointed by the Minister (who need not be lawyers) may, on their own initiative or at the request of any trade association, promulgate "fair trading rules" with regard to the supply and distribution of such goods, or with regard to the provision of services connected with the supply of such goods, as for example, the arrangement of hire-purchase facilities. Before making rules, the Commission are required to publish notice of their intention to do so, and to give interested parties an adequate hearing. At the time of writing, it appears that thirteen sets of rules had been made under

[3] A Government amendment was moved on the Committee Stage enabling the Commission to report on hire-purchase facilities afforded to traders.

this provision,[4] though the Commission report that "all the rules so far published have been made on the Commission's initiative," [5] notwithstanding the fact that they have received "the utmost co-operation" from the manufacturers concerned.[6]

2. The Commission may, on their own initiative, and shall, at the request of the Minister, cause an inquiry to be held into the supply and distribution of any kind of goods. The report of such inquiry, when submitted to the Minister, may be made the subject-matter of an order prohibiting certain practices though, as has been seen, such an order requires statutory implementation. Heavy penalties are prescribed for the infringement of an order so confirmed.
3. In addition to the specialised inquiries outlined above, the Commission is empowered "to keep under review the general effect on the public interest" of restrictive practices in connection with the supply and distribution of commodities, and may submit to the Minister a report on any such matter, together with their recommendations.
4. The Act lists a number of "unfair trade practices," but it goes on to provide that the list is not intended to be exhaustive, "and shall not limit the Commission in the exercise of their functions." The practices listed may be classified as follows—

   (a) Those which have the effect of unreasonably limiting or restraining free and fair competition or trade, or which have the effect of unjustly eliminating a trade competitor.

   (b) Those which unjustly enhance the price of goods or promote unfairly the advantage of suppliers or distributors at the expense of the public.

   (c) Those which prohibit or restrict without just cause the supply of goods to any person or class of person, or which are likely to restrict unjustly the exercise by any person of his freedom of choice as to what goods he will supply or distribute.

   (d) Those which exclude or are likely to exclude without good reason new entrants to any trade or industry, or secure or are likely to secure the territorial division of markets between particular persons or classes to the exclusion of others.

[4] Ropes, Cordage and Twines (1953); Nails and Screws (1953); Tableware (1954); Cutlery (1954); Petrol (1954); Electric Light Bulbs (1954); Sole Leather (1954); Files (1954); Dry Batteries (1954); Carpets (1954); Household Textiles (1955; Coal (1955); Aluminium Hollow-ware (1955).

[5] Fair Trade Commission, Third Annual Report, 1955, para. 8.

[6] *Ibid.*, Second Annual Report, 1954, para. 6.

(e) Those which "in any other respect operate against the public interest or are not in accordance with the principles of social justice."

It is interesting to contrast these "unfair" practices with the statutory "conditions" contained in sections 3–5 of the Act of 1948 and also with the "agreements" to which Part I of the Act of 1956 applies. One is struck by the width of the language in which the Irish legislation is framed, and it seems inevitable that serious difficulties will arise in the application of such vague terms as "unreasonably," "unfairly," "unjustly," and "without just cause" to industrial situations. Moreover, there is no indication as to the precise scope of "the principles of social justice," though perhaps this phrase is to be read in conjunction with the provision in the Irish Constitution which qualifies property rights in identical language.[7]

By the end of 1954, the Commission had, on their own initiative, held inquiries under the Act into the supply and distribution of (i) radio sets and accessories; (ii) building materials and components; and (iii) motor-cars and accessories. In addition, during 1954, an inquiry was begun into the practices current in the Irish Republic in relation to the supply and distribution of proprietary and patent medicines and infant foods, and medical and toilet preparations. Here, the Act was first subjected to judicial scrutiny. The Pharmaceutical Society of Ireland commenced proceedings in the High Court, seeking an order of prohibition against the Commission, inhibiting them from proceeding with such an inquiry so far as it related to the compounding and dispensing of medical prescriptions by licentiates of that society, on the ground that this was a professional activity, and not a sale of an article by way of trade, and so was outside the scope of the Act of 1953. This contention was rejected by the High Court, and on appeal to the Supreme Court the finding was affirmed by a majority, Kingsmill Moore and O'Daly JJ. dissenting,[8] on the ground, it appears, that it is impossible in the case of a pharmaceutical chemist to distinguish between his professional and trading activities. At the time of writing, this inquiry is still proceeding.[8a]

The findings of the Commission in the case of the radio trade contained a recommendation that an order be made by the Minister, and confirmed by legislation, prohibiting certain practices designed to promote resale price maintenance.[9] The publication of this report was followed in July, 1955, by the commencement of proceedings in the High Court by the Wireless Dealers Association, claiming declarations that the Act of 1953 was *ultra vires* the

[7] Article 43 (2) (i).

[8] Unreported. *The Irish Times*, January 31, 1956.

[8a] Since the above was written, the Commission has published the Report of an Inquiry into the Supply of Grocery Goods and Provisions (1956: Pr. 3722).

[9] Report of Inquiry into the conditions which obtain in regard to the supply and distribution of Radio Sets and Accessories. (1954: Irish Stationery Office, Pr. 2660), para. 121.

Constitution and that the report and the order made thereunder by the Minister were *ultra vires* the Act. Early in 1956, legislation was introduced to implement the order in this case, and despite a further attempt on the part of the Association to obtain an injunction restraining the Minister from proceeding with the Bill, which was unsuccessful, it was enacted into law.[10]

The other two reports of special inquiries held by the Commission to date also contain adverse comment on resale price maintenance practices, and in the case of the motor-car industry the Commission recommended a similar order to the earlier case, drafted in the widest terms. This was duly made and confirmed.[11]

It is of considerable interest to note that the scope of these orders is probably wider than that of Part II of the Restrictive Trade Practices Act, 1956. They prohibit both the "stop list" and the "approved list" practices and, unlike Part II of the 1956 Act, they extend to both "vertical" and "horizontal" price fixing arrangements "between suppliers or between suppliers and retailers or between retailers." In effect, they resemble very much the sort of prohibition imposed by the Criminal Code of Canada,[12] which extends the Combines Investigation Act (aimed at "horizontal" agreements) long in force in that jurisdiction.

In the course of the inquiry into the working of the Irish Wireless Dealers Association, it was urged upon the Commission that the practice of resale price maintenance was no longer prohibited in the United States, and legislation such as the Miller-Tydings Act, 1937, was cited in support of this contention. It will be recalled, however, that in 1951, the Supreme Court held that the Miller-Tydings Act did not legalise a procedure under which retailers could be forced to abandon price competition in the sale of a particular commodity merely because the supplier had made a price agreement with one retailer.[13] Moreover, the McGuire Act, 1952, which confirms the earlier legislation exempting certain agreements from the effect of the Sherman Act, specifically excludes from this dispensation any kind of "horizontal" price fixing.

At the moment, it is as yet too early to say with any certainty whether the Irish legislation has fulfilled the purpose for which it was enacted. In a State governed by a written constitution, the Act will sooner or later have to run the gauntlet of repugnancy, and it is difficult to predict the judicial attitude to the very comprehensive nature of some of its provisions. Enough has been said, however, to indicate the scope of the Restrictive Trade Practices Act, 1953, and to demonstrate that the problem of monopolies has been exercising the ingenuity of the legislators in yet another jurisdiction.

V. T. H. Delany.*

[10] Restrictive Trade Practices (Confirmation of Order) Act, 1956 (No. 15 of 1956).
[11] Restrictive Trade Practices (Confirmation of Order) (No. 3) Act, 1956 (No. 33 of 1956).
[12] Criminal Code, 1954, ss. 411, 412.
[13] *Schwegmann Brothers* v. *Calvert Distillers Corp.* (1951) 341 U.S. 384.

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LEGISLATION

Hotel Proprietors Act, 1956 [1]

An Act to amend the law relating to inns and innkeepers had clearly become due [2] and indeed the reference of this topic to the Law Reform Committee in 1954 was a preliminary expression of this need. The Committee's report in turn prompted the present legislation which has in large measure amounted to an enactment of the Committee's recommendations—indeed at times it would appear that the debates in Parliament were punctuated by a desire to follow slavishly the Committee's recommendations.[3] The Committee's report had reflected the view,[4] for instance, that the strict liability of the common law should be retained subject to amendments and overhaul of the Innkeepers' Liability Act, 1863. In carrying out this recommendation little or no consideration appears to have been given to the desirability of abolishing the strict liability.

An unfortunate instance of accepting wholly the Committee's Report is to be found in the definition. The Committee had found itself unable to provide a workable definition of an inn—the Committee was not at all sure that the ascertaining whether the premises in question constituted an inn or not created any difficulty in practice as opposed to theory.[5] It did, however, tentatively throw out the suggestion that the inn hereafter might be called "a hotel." [6] The draftsman of the Act has opted to discard the hallowed name of the "common inn" but only in so far as the

[1] 4 & 5 Eliz. 2, c. 62; based on the Second Report of the Law Reform Committee on the Law of Innkeepers' Liabilities for Property of Travellers, Guests and Residents. Cmd. 9161; May, 1954; noted at (1955) 18 M.L.R. 374. The Act came into operation on January 1, 1957.

[2] As the sponsor of the Bill said, ". . . the only purpose of the Bill is to bring the law up to date and to remove various anomalies," House of Commons, Official Report, Standing Committee C, May 2, 1956. Col. 7.

[3] House of Lords, Official Report. May 29, 1956. Vol. 197, col. 549. *Ibid.*, June 19, 1956. Vol. 197, cols. 1070, 1087, 1092, 1096. *Ibid.*, June 28, 1956. Vol. 198, cols. 149, 152–153 and 154. *Cf.* Vol. 198, cols. 150 and 154–155. On this hearing, the Report of Amendments the Lord Chancellor commented (col. 152–153): "I do not mean for a moment . . . that we should take the *ipse dixit* of the Law Reform Committee *there* [*i.e.*, on the amount of the limited liability] but what is important is that we should not lose the opportunity of giving effect to their recommendation in this Bill."

[4] *Op. cit.*, paras. 9 and 10, pp. 5–6.

[5] *Op. cit.*, para. 11, p. 6. The speciousness of this reasoning was alluded to in (1955) 18 M.L.R. 374. See *Olley* v. *Marlborough Court, Ltd.* [1949] 1 K.B. 532.

[6] An amendment to the Bill on Committee Stage in the House of Lords altering "a hotel" to "an hotel" was moved and agreed to on the grounds that it was a "demonstration in favour of elegance," House of Lords Official Report, June 19, 1956. Vol. 197, col. 1069.

liability is affected by the Act. Thus the common law inn, statutorily undefined and judicially imprecise in definition, remains in so far as the Act is inapplicable [7]; for example, the criminal law liability and the lien granted under the Innkeepers Act, 1878, are left untouched by the new enactment. This leaves a curious juxtaposition of inn and hotel. Under the Act, "an hotel within the meaning of this Act shall, and any other establishment shall not, be deemed to be an inn." [8] The Act proceeds to define [9] an hotel in terms not dissimilar from that usually attributed to an inn, although as a point of elegance it is curious to note that an hotel is an establishment "held out by the proprietor as offering food, drink, and if so required, sleeping accommodation. . . ." The relegation in the definition of "sleeping accommodation" to a subsidiary position is in practice unimportant, since the liability to a guest only exists where at the time the loss or damage occurred sleeping accommodation at the hotel had been engaged for the traveller [10] and the loss occurred within a narrow compass of time "for which the traveller was a guest at the hotel and [11] entitled to use the accommodation so engaged." [12] The wording of the definition in this way is clumsy or is at least an inelegancy which is augmented by the absence of a codifying Act on the law of innkeepers.[13]

Apart from the financial adjustment upon the limitation of the innkeepers' liability of £30 under the 1863 Act to £50 for any one article and £100 in aggregate for any one guest [14] and the removal of doubt on the question of the innkeepers' liability for damage as

[7] It is clear that the status of the Common Law Inn is retained and not discarded, House of Lords, Official Report, May 29, 1956, Vol. 197, col. 544.

[8] s. 1 (1).

[9] s. 1 (3). It would appear that the "motel" (roadside hotel), which does not normally provide food and drink, will be outside the definition, see (1955) 18 M.L.R. 374.

[10] s. 2 (1) (*a*).

[11] An amendment to substitute "or" for "and" was rejected, House of Lords, Off.Rep., Vol. 197, cols. 1082 *et seq.* If two people book accommodation at the hotel and the first motors down with the luggage of both and places his friend's luggage in his friend's room, there would be no liability if the luggage were stolen before the friend's arrival.

[12] s. 2 (1) (*b*).

[13] Apart from the retention of the present criminal law liability and the Innkeepers Act, 1878, the legislature lost an opportunity of providing a more convenient procedure for enforcing the criminal liability. It might have been thought worth while substituting a summary procedure for the present cumbrous method of proceeding by way of indictment. A Bill on these lines entitled the Innkeepers Liability Amendment Bill was introduced in 1903. The paucity of prosecutions in recent years may refute the utility of such legislation. *Cf. R.* v. *Higgins* [1948] 1 K.B. 165. Equally, it may show that the procedure is too cumbrous.

[14] An amendment raising the limit to £200 was passed on Report Stage, House of Lords Debate, Official Report, Vol. 198, col. 156. An amendment on Committee Stage raising it to £500 was rejected, *ibid.*, Vol. 197, col. 1099. The amendment to £200 was rejected by the House of Commons, Debates, July 17, 1956, Vol. 556, col. 1339.

well as loss,[15] the major revision of the new Act concerns the liability for a guest's vehicle brought *infra hospitium*.

The removal of the strict liability with regard to vehicles[16] represents the concession to a plea of hardship that was said to exist as manifested by the contrasting cases of *Williams* v. *Linnitt*[17] and *Tinsley* v. *Dudley*.[18] The abolition of strict liability in this instance might justifiably have been counterbalanced by a proviso to the effect that the hotel proprietor should be liable for negligence, "notwithstanding any agreement to the contrary."[19] An introduction of a provision against the application of an exemption clause finds a precedent in the Hire Purchase Act, 1938[20] and in a limited provision in the recent Government Bill, the Occupiers Liability Bill.[21] The specious argument that the hotel proprietor is on the same footing as the garage proprietor was heeded. Both the fact that the amenity of a garage in proximity to the inn is a considerable attraction to the traveller,[22] and the relevancy of insurance in this connection seem to have been brushed aside. If insurance was a factor which led the draftsman to remove the strict liability, similarly insurance was pertinent to any inquiry in relation to the exclusion of an exemption clause. In considering the effects of insurance it must be noted that the hotel proprietor not unreasonably is expected to, and normally does, insure, whereas large numbers of the motoring public insure only against third party risks. Elimination of the aspects of insurance results in the sole question being posed, whether the loss from an hotel garage is in *pari materia* to the loss occasioned from the ordinary garage. The Lord Chancellor in the debate in the House of Lords evidently thought so.[23]

On the minor aspects of the provisions of the Act a warm welcome is likely to be accorded by hotelier and guest alike to the substitution of a notice in plain and simple everyday language

[15] The doubt created by the decision of Swift J. in *Winkworth* v. *Raven* [1931] 1 K.B. 652 necessitated a precise provision to the effect that no distinction was justifiable despite a contemporary judgment of Finnemore J. in *Williams* v. *Owen* [1955] 1 W.L.R. 1293 following *Winkworth* v. *Raven*. For a criticism of this case, see (1956) 19 M.L.R. 408.

[16] s. 2 (2).

[17] [1951] 1 K.B. 565.

[18] [1951] 2 K.B. 18. For an interesting comment on these two cases, see (1951) 24 A.L.J. 19.

[19] An amendment to this effect was tabled on Committee Stage in the House of Lords but was by leave withdrawn, on the undertaking that the matter would be discussed outside the House, House of Lords, Official Report, June 19, 1956, Vol. 197, cols. 1090–1094. The amendment was not put down on Report Stage.

[20] s. 8 (3).

[21] Clause 3.

[22] This was referred to only by Lord Faringdon, House of Lords, Official Report, June 19, 1956, Vol. 197, col. 1094. The case for the amendment seeking to prevent exclusion of liability for negligence was cogently argued by Lord Silkin, *ibid.*, cols. 1090–1091, as was the majority of the amendments tabled, *ibid.*, Vol. 197, cols. 546–547, and 550, 730–731, 732, 733–734, 1069 and 1090–1091; Vol. 198, col. 146.

[23] House of Lords, Official Report, June 19, 1956, Vol. 197, col. 1091–1092.

for the copy of a stolid section of an Act of Parliament.[24] The posting of the new notice alone will suffice to give the hotel proprietor protection from the strict liability, for any extant notice under the 1863 Act will be ineffective. In cases such as this where legislation requires action from a large number of persons in all parts of the country, would not an interim provision, for say twelve months, be advisable to allow an 1863 notice to be effective to the extent of the increased amounts in the limited liability?

Other minor alterations include the removal of strict liability for the property left in a vehicle,[25] thus negativing an artificial distinction between the vehicle and goods left in the vehicle made by McNair J. in *Gresham* v. *Lyon*,[26] and, as a concession to elegancy, the shortening of the title from Hotel Proprietors (Liabilities and Rights).[27]

Minor amendments which might have found favour, but did not, include a definition of the word "proprietor"[28] and a clarification of the scope of the provision concerning property deposited for safe custody.[29] In the former case plaintiffs hitherto have sued either the manager of the inn or the owners when the latter were the proprietors.[30] Does the use of the word proprietor mean that only the legal owner is henceforth subject to liability or does the wording, "the proprietor of an hotel shall not be liable as an innkeeper to make good . . . etc.,"[31] give the plaintiff an alternative party to sue? On the latter point the section produces a curious result, for only "the guest or some other guest acting on his behalf" can effectively proffer the valuables for safe custody. It seems strange that a fellow guest acting as agent may effectively make the deposit whereas a servant of the guest may not do so.

[24] Proviso to s. 2 and the Sched. attached. This provision was introduced in the House of Lords.

[25] s. 2 (2).

[26] [1954] 1 W.L.R. 1100; followed by the Ontario Court of Appeal, *George* v. *Williams* [1956] 5 D.L.R. 21.

[27] s. 3 (1). See House of Lords, Official Report, June 19, 1956, Vol. 197, col. 1110.

[28] House of Lords, Official Report, June 19, 1956, Vol. 197, cols. 1078–1080.

[29] s. 2 (3) (*c*).

[30] *Cf. Gresham* v. *Lyon* [1954] 1 W.L.R. 1100 (where the defendant was stated to be the owner but contra *The Times*, September 18, 1954), *Williams* v. *Owen* [1955] 1 W.L.R. 1293 (where the defendant was the managing director of the hotel), *Williams* v. *Linnitt* [1951] 1 K.B. 565 (where the defendant was the proprietor) with *Gee, Walker and Slater* v. *Friary Hotel (Derby), Ltd.* (1950) 66 T.L.R. (Part I) 59, *Watson* v. *Peoples' Refreshment House Association, Ltd.* [1952] 1 K.B. 318 and *Shacklock* v. *Ethorpe, Ltd.* [1939] 3 All E.R. 372 (H.L.). The point never appears to have been taken in an English court. In the case of New Zealand a curious position has arisen. The contents of s. 174 of the New Zealand Licensing Act, 1908, have been borrowed from the Imperial 1863 Act, but its appearance in a licensing Act which defines the innkeeper as the licensee raises the problem as to the ability to sue the proprietor who may be a limited company. This conundrum was raised but was left unanswered in a New Zealand decision since the parties agreed to accept that the defendant could take the benefits of s. 174, Callan J. in *Hawkins et Ux.* v. *Dominion Breweries, Ltd.* [1948] N.Z.L.R. 15 at p. 27.

[31] s. 2 (1).

In totality this Act is a useful addition to the law of innkeepers —or must one say "hotel proprietors"? That it falls short of fulfilling the need for a comprehensive codifying Act is undeniable, but within its limited scope there can be few complaints apart from the absence of a proviso to exclude exemption clauses in relation to vehicles. It is perhaps, therefore, captious to be critical. The missed opportunities and the minor defects within the existing framework do not detract measurably from a piece of legislation which brings the law nearer to social conditions.

L. J. Blom-Cooper.

The Rent Bill [1]

It is unlikely that anyone will accuse the Government this time of presenting the landlords with a "mouldy turnip." In effect the new Bill sweeps away [2] the substance of the old system of rent control under the existing Rent Restriction Acts, by the following provisions—

(1) Any dwelling-house, the net rateable value of which exceeded £40 in London on November 7, 1956, or £30 elsewhere, is to be automatically decontrolled. On decontrol operating the tenant will be entitled to not less than six months' notice to quit, during which period the old rent will still apply. On expiry of the notice the tenant will cease to have any protection whatsoever, either as to the amount of the rent payable or as to security of tenure. The Bill also confers power on the Minister by Order to decontrol further categories of houses by reference to their rateable values.

(2) The Rent Acts are not to apply to a tenancy beginning on or after the date when the Bill takes effect. This will have the effect of decontrolling all owner-occupied houses at present within the Acts, and will also automatically result in decontrol whenever a dwelling-house reverts to the possession of the landlord. The Acts are, however, still to continue to apply where a new tenancy is granted to a person who, immediately beforehand, was a controlled tenant of the same dwelling.

(3) Furnished lettings outside the limits of rateable value referred to under (1) above are also to be excluded from control under the Furnished Houses Act, 1946.

(4) As regards dwelling-houses which will still remain subject to rent control, the old limits of standard rent (including the

[1] This note was completed just too late for inclusion in the issue for December, 1956. There is at present a good deal of agitation against certain provisions of the Bill but as yet (February 1, 1957) no officially-sponsored amendments have emerged; it would therefore be futile to speculate as to possible changes, so this note has been left as it stands.

[2] But not existing rents which *exceed* the new ceiling. Thus still further anomalies will be created.

repairs and services increase provisions of the 1954 Act) are in effect to be abolished and a new rent limit substituted. This new limit is to be a multiple of the 1956 gross value of the premises, the multiple varying between $2\frac{1}{3}$ and $1\frac{1}{3}$ according to the distribution of responsibility for repairs as between landlord and tenant. Three months' notice of increase is required but the total increase within nine months of service of the first notice is not to exceed seven and six-pence a week. There is also provision for additions in respect of rates, and of services or improvements provided by the landlord.

(5) The Bill contains some very complicated provisions for rendering an increase of rent irrecoverable where the premises are not in a proper state of repair. Disrepair for this purpose must be due to defects for which the landlord is responsible and which ought reasonably to be remedied, having due regard to the age, character and locality of the dwelling. The tenant has to serve a notice on the landlord and if this is not complied with or a suitable undertaking given to remedy the defects an application can be made to the local authority for a certificate of disrepair. If a certificate is issued, the landlord is given an opportunity to apply to the local authority for the certificate to be cancelled; if this is refused he can then go to the county court and try to persuade that tribunal to order that the certificate should cease to have effect from such date as may be specified in the order.

(6) Part I of the Landlord and Tenant Act, 1954, provides protection for the tenant by way of a special statutory tenancy on the expiry of long leases (*i.e.*, exceeding twenty-one years) at a low rent (*i.e.*, less than two-thirds of the rateable value), provided the tenancy is one which is within the financial limits of the Rent Acts. The Rent Bill now takes all such long leases out of the Rent Acts (whether at a low rent or not) but extends to all such leases the protection of Part I of the 1954 Act, if they are within the financial limits of the existing Rent Acts (*i.e.*, £100 in London, £75 elsewhere as at September, 1939): this appears to be the combined effect of Rent Bill, clauses 9 (4) and 13.

The Rent Acts have long been recognised as due for a comprehensive overhaul, in particular from the point of view of the levels at which standard rents are fixed. It seems clear that landlords cannot be expected indefinitely to subsidise their tenants' rents by a ceiling being fixed at what is an uneconomic rent. The 1954 Repairs and Rents Act has admittedly failed to remedy this defect; the repairs increase has proved far too complicated and subject to too many hurdles to assist the ordinary landlord; and the services increase seems to have mainly benefited the big property companies. There is, therefore, much to be said for a simpler and more general mode of increase, and now that the new valuation for rating has been effected it seems reasonable to link this to the amounts of the new assessments. The Government have produced a battery

of statistical information (see Cmnd. 17, November 1956) to show that the new ceiling of rents will not result in excessive increases. It is difficult for a mere lawyer to evaluate these figures; but no doubt in the case of some special categories such as age-old pensioners relief can be given where hardship would otherwise result.

Equally important is the question whether the provisions for abatement of the increases in the event of disrepair will be effective in inducing landlords to maintain their property in a fit state. In the first place it may be thought that the present proposals give landlords far too much opportunity for exercising delaying tactics in opposing a reduction of rent. Secondly, it seems probable that many tenants will be reluctant to go to the trouble and expense of fighting their landlords through to the county court; they may also find it both difficult and expensive to bring technical evidence before the court for this purpose. From this point of view there is much to be said for the court inspecting the premises in every case and relying primarily on the evidence of its own eyes and ears, though not necessarily to the exclusion of technical evidence which either side may wish to call. Whether this would be practicable in the county court may, however, be open to question; if it is not, it might be better to leave this type of dispute to the more informal procedure of the Rent Tribunals.

As for decontrol which will result from vacant possession, this seems likely to create many problems and difficulties. In particular, it will probably act as a clog on the mobility of labour, since a workman is not likely to want to move to another area if he will thereby have to give up his controlled tenancy and take over one which is uncontrolled. Also, as was found after this form of decontrol was last introduced in 1923, its operation is haphazard in the extreme, resulting in the wrong category of premises being released from control too soon, and creating fresh anomalies, since for instance adjoining houses in the same street may be controlled or uncontrolled, due to the accident of a change of tenancy in any particular case.

A still more disturbing aspect of the present Bill is the proposed total decontrol of all dwellings over £40/£30 in value. It will be appreciated that these figures on 1956 assessments extend decontrol down to a good deal lower category of dwelling than would have been the case under the former 1939 valuations. Such a wide measure of decontrol is sought to be justified on the ground that the effect of the Bill will be to release quantities of concealed accommodation, so that a tenant of this category of property will be able to make a fair bargain with his landlord having regard to the availability of other premises. This is all very well, but not only does it remain very much in the region of hypothesis, but also there is no guarantee that any newly released accommodation will be available in the places where it is most wanted. It is said that

decontrol under this head will affect some 800,000 dwellings, many in the big cities, more particularly in London, where to date there is still a chronic shortage. There does, therefore, seem to be a very grave danger that the tenants of these premises will find themselves faced with the choice of paying such exorbitant rents as their landlords care to exact or being put out in the street. Surely there is an overwhelming case for at least some transitional [3] measure of protection here, whether in the form of fixing a ceiling for the new rents, or giving the tenant security of tenure pending agreement as to the new rent, with a right to refer the matter to the county court or Rent Tribunal, if no agreement can be reached.

For while it may be true that rents of such premises are unduly low from a purely economic standpoint, no evidence has been adduced to show that landlords of such premises are a depressed class who should now be given the chance to exploit to the full any local scarcity of accommodation which may exist. Moreover, many of the tenants in this category will obviously belong to the salaried middle-class section of the population who are least able to bear a sudden large increase in their expenditure and who are most vulnerable to the threat of eviction. It is difficult to see what comparable gain is to be expected to offset the grave social problem which may well result from this ill-considered "free-for-all."

Dennis Lloyd.

[3] It may be suggested that there is also a strong case for a *permanent* system of security of tenure on lines similar to those provided for business premises in Part II of the Landlord and Tenant Act, 1954. This would obviate abuse and would enable the existing form of control to be got rid of more speedily.

REPORTS OF COMMITTEES

Report of the Committee on Cheque Endorsement

The Committee on Cheque Endorsement were appointed by the Chancellor of the Exchequer in April, 1955, after the introduction of a private member's Bill by Mr. R. Graham Page, the principal object of which was to reduce the need for the endorsement of cheques in certain circumstances. The Chairman of the Committee was Mr. A. A. Mocatta, Q.C., and one of the other members was the General Editor of this *Review*.

In a memorandum prepared before the introduction of his Bill, which he afterwards made available to the Committee, Mr. Page suggested that 600 million cheques needing endorsement were issued each year and that some thirteen million of the endorsements required confirmation by the banks. The Committee of London Clearing Bankers did not dissent from these figures.

The Report of the Committee on Cheque Endorsement [1] was published last November, and the chief recommendation of the Committee was summarised thus: "We consider that a substantial saving of unproductive work would be achieved, and the present system would be appropriately adapted to modern conditions and needs, if it were arranged that endorsement was no longer necessary on a cheque being collected by a bank on behalf of a customer who was the payee. We recommend a change of law to this effect, making it clear that collecting banks should not suffer any loss of protection thereby" (paragraph 109 (v) of the Report). The Committee also recommended that similar arrangements should apply to those dividend and interest warrants and comparable instruments which do not come within the statutory definition of a cheque but fall within section 17 of the Revenue Act, 1883.

Cheques with a form of receipt endorsed thereon presented a special problem. The Committee of London Clearing Bankers and one organisation representative of bank employees gave evidence that it would not be reasonable to relieve the banks of the responsibility for examining the backs of cheques for endorsements and to leave them with the work of continuing examination for receipts. At the same time, a number of witnesses representing industry and commerce expressed strong reluctance to see the end of the system of bank supervision of cheque receipt forms. The Report reads: "In this problem the Committee of London Clearing Bankers have after full consideration agreed to help. They have stated that, while the banks could not undertake to examine receipts on cheques

[1] Cmnd. 3, H.M.S.O., 1956. Price 1s. 3d.

without limit as to number and regardless of circumstances, they would be willing in principle to continue this work by arrangement with customers in suitable cases" (paragraph 89).

It is much to be hoped that the Committee's recommendations will be implemented as soon as possible.

J. Milnes Holden.

NOTES OF CASES

The Economic Interests of Children as Matters Merely Incidental to Divorce

Three recent decisions have illustrated the effect that a decree of divorce may have on the financial relations between a husband and wife. They have made even clearer the neglect of our law to take proper account of a more important question, *viz.*, the economic effect of such a decree on the children of the marriage, who are not parties to such proceedings, whose interests are not necessarily represented, and whose status as the children of their parents is not affected.

The most startling, and also the most complicated, of these decisions is that of *Wood* v. *Wood*.[1] Here a man who had acquired a domicile in Nevada divorced there, without her knowledge or an opportunity for her to be heard, the wife he had previously deserted in England, on the ground that they had not lived together for three years. The Divisional Court [2] held that, on returning to this country, he was entitled to the discharge of an order previously made by the magistrates' court in England that he should pay maintenance for his wife and the two infant children of their marriage.

Apart from any questions arising between the husband and wife, this means that, having obtained a divorce in Nevada, the father could, while resident in England and enjoying an income here, evade his common law duty to maintain the infant children born to him here in lawful wedlock, although even the court of Nevada had not decided that he was any less the father of his children, because by the law of Nevada their mother was no longer his wife. Although an appeal is expected, it may be of interest to consider the facts of this situation, and the broad principles of the law applied to produce so odious a conclusion.

The parties were married in England in June, 1945, the husband then being of English nationality and domicile, and had two children. In February, 1950, the wife satisfied the magistrates' court in England that her husband had deserted her, and obtained orders under the Summary Jurisdiction (Separation and Maintenance) Acts,[3] that he should pay to her £3 per week for her own maintenance and 15s. per week for the maintenance of each of their two children.

[1] [1956] 3 W.L.R. 887. Also reported in [1956] 3 All E.R. 645.
[2] Of Lord Merriman P. and Collingwood J.
[3] The Summary Jurisdiction (Married Women) Act, 1895, s. 5, as amended, in respect of maintenance for the wife; the Married Women (Maintenance) Act, 1920, s. 1, as amended, in respect of maintenance for the children.

The husband owned a troupe of performing chimpanzees, and in January, 1953, he took them to America, together with his mistress, then pregnant by him. Shortly after arriving in America he invited his wife also to join the party, but in view of the presence of this other woman she not unnaturally refused. He exhibited his chimpanzees in New York and Las Vegas, Nevada, and according to his own subsequent statements he then decided to settle in Las Vegas because they found the climate, as he found the rate of income tax, more favourable than their English equivalents. Not having the necessary immigration papers to establish permanent residence in the United States, he went to France, where he managed to obtain them, and on return to Las Vegas in March, 1954, he there acquired a house and grounds. In September, 1954, the court in Las Vegas granted him a decree of divorce from his wife on the ground that they had not lived together for three years. The necessary qualification for these proceedings is residence in Nevada for six weeks, although he had apparently been resident for a longer period. The only service of the proceedings was by advertisement in a Las Vegas newspaper, so that the wife in England knew nothing about the proceedings until after the decree, and had no opportunity of being heard. That the interests of the children were not represented calls for no comment, as this would also have been the case in England.

In 1956, the husband came to England to exhibit his chimpanzees at the London Palladium, whereupon his wife had a warrant issued for arrears of £260 10s. under the maintenance order. These arrears were paid by instalments, but in the meantime he applied for the maintenance order to be discharged on the grounds that he was divorced. The wife, for her part, applied for the amount of maintenance to be increased because of the improvement in his financial circumstances. At the hearing of these applications the magistrate held—

(1) that the husband had, at the time of obtaining his divorce in Nevada, established by English law a domicile in that state sufficient to give the court of Las Vegas jurisdiction to dissolve his marriage. By English law this meant that both his wife and children in England were domiciled in Nevada;

(2) that the wife had known nothing of the divorce proceedings until after the decree had been pronounced;

(3) but that since a decree of divorce in the English courts does not automatically terminate a maintenance order previously made in the magistrates' courts,[4] the Nevada divorce need not terminate the wife's remedies in the English magistrates' courts, although some divorce decrees granted

[4] *Bragg* v. *Bragg* [1925] P. 20.

by competent foreign courts had been held to have this effect [5];

(4) that in this case it was contrary to natural justice that the innocent wife should be deprived of her right to maintenance by a husband who had deserted her in the first place, and

(5) that in view of the former husband's improved circumstances, the maintenance order should be increased from £3 to £5 per week for the former wife and from 15s. to 30s. per week for the maintenance of each of the two children, then aged ten and eight years respectively.

On an appeal by the husband, the Divisional Court upheld the magistrate's first two findings, but held—

(a) that ignorance of the proceedings by the wife did not invalidate the decree or render it contrary to natural justice [6];

(b) that there was no reported case in which an order for maintenance had been continued in favour of a wife *against whom* a divorce decree had subsequently been granted, whether by an English or a foreign court;

(c) that, where a wife is divorced by a foreign court of competent jurisdiction, any maintenance order outstanding must be discharged if the wife has been found not to be entitled to maintenance in that foreign court, and that it should be discharged where her rights in the foreign country differ from those in this country, or where, as here, there was no evidence as to the wife's rights in the foreign country.

Therefore the maintenance order in respect of both wife and children would be discharged.

It is noticeable that consideration of the interests of the children, or even of a father's duty at common law to support his children, formed no part of either judgment. This common law duty was, however, enforceable in private law only by his wife's right to pledge his credit, if that existed, for necessaries for herself and the children.[7] By the Summary Jurisdiction (Married Women) Act, 1895, wilful neglect by the husband to provide reasonable maintenance for his wife or her infant children whom he was legally liable to maintain was a ground on which the wife could apply to the magistrates' courts for a separation or maintenance order. The Married Women (Maintenance) Act, 1920, s. 1, provided that where the order made contained a provision committing the legal custody of any children of the marriage to the woman applying, it might also include a provision that the husband should pay to her or to any officer of the court or third

[5] *Mezger* v. *Mezger* [1937] P. 19; *Kirk* v. *Kirk* [1947] W.N. 161.
[6] *Boettcher* v. *Boettcher* [1949] W.N. 83; *Igra* v. *Igra* [1951] P. 404.
[7] *Bazeley* v. *Forder* (1868) L.R. 3 Q.B. 559, C.A.

person on her behalf, a weekly sum (since increased to 30s.) for the maintenance of each such child. It is most unfortunate that the wording of the Act makes the provision in favour of the wife and not the child, and gives no power to any person other than the wife to apply for or enforce such maintenance payments.[8] Thus it comes about that the father's duty to maintain his children may depend in private law on the status of their mother as his wife [9] and her decision to apply for and enforce the order.

There would seem to be another possibility of obtaining maintenance for children in such a case as this, *viz.*, under the Guardianship of Infants Acts,[10] which are applicable to the relationship of parent and (legitimate) child, and jurisdiction in respect of which depends on the nationality of the parties or their presence within the jurisdiction. This would, however, be a cumbersome alternative, necessitating the discharge of the order already in being and the making of a fresh order under a different series of Acts.

The questions arising in regard to the conflict of laws will no doubt receive the consideration of the Court of Appeal, but the following brief summary may be permitted at this stage:

Both the magistrate and the Divisional Court were in agreement on the application to the question of the husband's domicile. Here two separate points arise for consideration:

(i) *the domicile of dependence*

The decision is but another example of the unrestrained liberty accorded in English law to a man not only to acquire for himself any domicile he may choose, but also to impose that choice, even against their will, to the detriment of their interests, and in defiance of the actual facts, both on his wife and his infant children, even though, as here, one of his objects in so doing is to destroy the family, from the unity of which the rule is alleged to flow, and to evade his obligations towards them by the law of the only country in which the family has existed as a unit. The unity principle in respect of the dependent domicile of a married woman and infant children is a fiction of the law invoked only when the unity of the family has no existence in fact. When unity exists, the invocation of the doctrine of dependent domicile is unnecessary.

[8] Thus in *Kinnane* v. *Kinnane* [1954] P. 41, Lord Merriman P. said: "... the underlying basis of the married woman's summary jurisdiction code ... is, in a sentence, that it is the wife who is the applicant; it is in favour of the wife and of nobody but the wife that whichever of the permitted orders the court decides to make is made. We talk loosely of an order for the children. It is not an order for the children ... whatever order is made is an order in the wife's favour."

[9] It also follows that the order must be discharged if she commits adultery, s. 7: even if this is condoned: *Marczuk* v. *Marczuk* [1956] P. 217, C.A.

[10] 1886–1951. Presumably no application was made under these Acts in the case under discussion because at first instance the magistrate affirmed the continuing validity of the order under the Summary Jurisdiction (Separation and Maintenance) Acts.

That a woman should be submitted to the law of a country chosen by a husband who has deserted her, committed adultery, failed to maintain her, and then used the law of the chosen country, as here, to divorce her without notice when she has committed no matrimonial offence by the law of the only country in which they have lived together as man and wife, is a principle still defended by English lawyers [11] on the grounds of logic of a somewhat theological nature. But the refusal of the protection of English law to infant children, born in this country to a father present and earning income here, on the grounds that their mother is no longer his wife by the law of a country with which they have no real connection whatever, seems as contrary to logic as to social responsibility.

(ii) *the choice of domicile as the relevant connecting factor*

The court was here faced with a choice of connecting factors.[12] Overriding jurisdiction to dissolve a marriage is, in English law, accorded to the law of the domicile, but jurisdiction in respect of maintenance orders in the magistrates' courts is based on the residence in England of the respondent.[13] Both courts chose to

[11] The Private International Law Committee recommended in 1954 that the domicile of dependence of a married woman should continue, except that a married woman who had been separated from her husband by the order of a court of competent jurisdiction should be able to acquire a separate domicile. This would not help the deserted wife. The Committee also recommended that the domicile of an unmarried infant should normally follow the domicile of the person in whose custody he is: Cmd. 9068.

[12] It is usual to express this problem in the conflict of laws as one of classification. Thus in such a case as this the question is presented as one of determining whether, for the purposes of the conflict of laws, the problem is primarily one concerning the results of divorce (in which case the relevant connecting factor is domicile) or concerning the law of maintenance (in which case the connecting factor is residence). It is submitted that this is a scholastic inversion of the choice actually made, which is of the connecting factor the court wishes to apply.

[13] *Forsyth* v. *Forsyth* [1949] P. 125, *Macrae* v. *Macrae* [1949] 1 All E.R. 290. By the Maintenance Orders Act, 1950, s. 1, the jurisdiction has been extended to include proceedings against a man residing in Scotland or Northern Ireland, if the applicant resides in England and the parties last ordinarily resided together as man and wife in England. The residence qualification is liberally interpreted: *Lowry* v. *Lowry* [1952] P. 252. For the purposes of judicial separation, the residence of the petitioner and the presence of the respondent husband have been held to give the English courts jurisdiction: *Matalon* v. *Matalon* [1952] P. 233, C.A.

By the Matrimonial Causes Act, 1950, s. 23 (formerly the Law Reform (Miscellaneous Provisions) Act, 1949, s. 5, the High Court has jurisdiction to make a maintenance order if it would have jurisdiction to make an order for judicial separation. *King* v. *King* [1953] A.C. 124, establishes that the court will take jurisdiction to make an order under s. 23 where an order for judicial separation has already been made. It is submitted that no application could be made by a wife under s. 23 after a divorce granted by a competent court, but the question of whether an order once made would be terminated by a subsequent divorce by a foreign court remains open. In *Pastre* v. *Pastre* [1930] P. 80, Hill J. felt bound to discharge an order for permanent alimony on judicial separation made in the High Court, when the husband subsequently obtained a divorce decree in France, the country of his domicile.

consider the domicile of the parties as the relevant connecting factor.

On the matter of substituted service, the Divisional Court went further than any previous decision in holding that ineffective service by the court dissolving the marriage was quite irrelevant. The fact that a divorce decree has been obtained *ex parte* has also been considered of crucial importance in the recognition by other members of the United States of divorce decrees granted in one of those States.[14]

The Divisional Court also concluded, after considering the relevant authorities, that a wife is entitled to maintenance where she has subsequently been the successful petitioner for divorce, but no maintenance where she is the unsuccessful, though unheard and innocent respondent. It is more than strange to find that the maintenance of legitimate children, not even represented in the divorce proceedings, should depend on which of their parents initiated matrimonial proceedings against the other. In both the previous cases where the English courts have set aside a maintenance order where the marriage has subsequently been dissolved in a foreign court the circumstances were very different from those under consideration. In one case [15] the wife had unsuccessfully applied for maintenance in the court of the domicile, and in the other [16] she had herself instituted the divorce proceedings in the court of the domicile, which was Scotland, and could reasonably be referred to the remedies available to her there.

No reference appears to have been made at the hearing to the considerable case-law in the United States in respect of these Nevada divorces, where the doctrine of the divisible divorce has been applied by the other States. The fact that the parties are no longer man and wife is recognised, but full effect is not given to the effects on maintenance normally incidental to divorce.[17] Such a decision seems more just than that reached by the Divisional Court in England. If a domicile in Nevada is once established, no other country is perhaps justified in trying to hold one party to a marriage which the other has repudiated and can discharge in the country of his domicile, but this need not mean that the party who has not been heard should be deprived of the means of subsistence.

[14] See *Estin* v. *Estin*, 334 U.S. 541 (1948), considered, *post*.

[15] *Mezger* v. *Mezger* [1937] P. 19.

[16] *Kirk* v. *Kirk* [1947] W.N. 161. Apparently in that case the husband was not resident in England, since the court said that it was doubtful if the English maintenance order was enforceable in Scotland.

[17] In *Estin* v. *Estin*, 334 U.S. 541 (1948), the Supreme Court of the United States held that such decisions did not violate the obligation to give full faith and credit to the legal decisions of other States. Frankfurter J. and Jackson J. dissented on the grounds that by the law of New York, which was applying the doctrine, a New York divorce terminated all obligations under maintenance payments, and that this being so, the courts of New York were not entitled to hold that a divorce in Nevada did not have this effect.

After the exotic atmosphere of Nevada, any purely domestic English decision must bear a prosaic appearance, but the decision of Wallington J. in *Sievwright* v. *Sievwright* [18] provides a further illustration of the injustice done to children's legitimate claims to property by rendering these ancillary to and dependent upon the successful prosecution of these claims by their mother. In this case the wife's father had conveyed a house into the joint names of the husband and wife as joint tenants on trust for sale. This house became the matrimonial home. The wife petitioned for divorce in 1949, and a decree absolute was granted on the husband's application (since the wife failed to apply) in January, 1950. It was clear that, if application had been made under the Matrimonial Causes Act, 1950, s. 25,[19] within two months of the divorce, the conveyance of the house would have been considered a post-nuptial settlement, which the court might have varied in favour of the child of the marriage or the wife petitioner.[20] No such application was, however, made until five years later, soon after the wife had changed her solicitors. By that time the house had been sold, and with the wife's consent £3,000 of the proceeds of sale had been handed over to the former husband, and had disappeared in discharge of his various bank overdrafts. Application was therefore made for a declaration that the former husband had received the £3,000 in a fiduciary capacity, or that if it could still be traced in his hands, the wife should be entitled to have it brought back into the settlement. As Wallington J. said in the course of his judgment: "Not until someone acting for the wife in November, 1955, woke up to the fact that maintenance for the child and perhaps some variation in the interests of the child might be fruitful, did any idea enter anyone's mind that this was a transaction which ought to be dealt with by an application such as this." In view of the delay which had occurred, and the fact that the £3,000 had been paid over to the former husband free of any declaration of trust, the court felt obliged to uphold the decision of the registrar that the former husband could not be called upon to bring the sum back into the settlement, since it no longer existed.[21] This is a clear example of the financial interests of the child of the marriage having gone by default in the divorce litigation between her parents. There would seem to be a strong case for a provision that, in any divorce proceedings in which property of value is owned by either or both of the parties, separate representation of the child should be required in the divorce

[18] [1956] 1 W.L.R. 1452. Also reported in [1956] 3 All E.R. 616.

[19] Formerly the Judicature Act, 1925, s. 192.

[20] The section is peculiar in speaking of settlement of the property "for the benefit of the children of the marriage or of the parties to the marriage," a reversal of the usual order of priority.

[21] Settlement was, however, made in respect of one half of a balance of £2,000 from the sale of matrimonial property still held in a joint account for the benefit of the husband and wife.

proceedings, so that the question of appropriate provision can be fully considered.[22]

A slightly different example of failure to make the best possible financial provisions for the children of a marriage that was being dissolved occurred in *Sugden* v. *Sugden*.[23] After a divorce decree in 1945, a consent order was made by which the husband undertook to pay maintenance of £300 per annum for each of the two children of the marriage, then aged respectively eight and four years, until they each attained the age of twenty-one. The father paid regularly under the order until his death in 1955, leaving all his property to the value of some £37,000 to his second wife, to the exclusion of his children by the first marriage. The second wife refused to continue payments for the maintenance of these children after their father's death, and their mother applied for an order that she should do so from the deceased's estate. At first instance Karminski J. granted such an order,[24] holding that during the father's existence the mother had an enforceable claim against him, and that this was kept alive by the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1), but the Court of Appeal [25] reversed this finding, and held that, since an order made under the Matrimonial Causes Act, s. 26, for the maintenance of children could only be enforced during the lifetime of both parties, a consent order of this kind also came to an end with the death of the former husband. This would also seem to have been an appropriate case for the interests of the children to be separately represented in the divorce proceedings, when such contingencies as the father's death before the children reached the age of twenty-one could have been provided for [26] by secured provision [27] or deed of covenant.[28]

O. M. Stone.

No Room in the Statute

There can be no doubt that Roxburgh J. was abundantly justified in law in holding in *Re C. T.* (an infant) and *Re J. T.* (an infant) [1] that the courts have no jurisdiction under the Guardianship of

[22] The Matrimonial Causes Rules provide only (rule 44 (3)) that the court may direct separate representation of the children when an application for secured provision, settlement of the wife's property, or variation of settlements has already been made.

[23] [1957] 2 W.L.R. 210, C.A. Also reported in [1957] 1 All E.R. 300.

[24] [1956] 3 W.L.R. 1010. Also reported in [1956] 3 All E.R. 874.

[25] Of Denning, Hodson and Morris L.JJ.

[26] This is particularly necessary since the Intestates' Estates Act, 1952, came into operation, since on a death intestate the surviving spouse takes the personal chattels and the first £5,000 of any estate, together with a life interest in one half of the balance where the deceased left issue. The other half of the balance is held on trust for the issue.

[27] See Denning L.J. [1957] 2 W.L.R. 210, 213.

[28] See Hodson L.J., *ibid.*, p. 216.

[1] [1956] 3 W.L.R. 826. Also reported in [1956] 3 All E.R. 500.

Infants Acts [2] to award to the putative father the custody of an illegitimate child.

What is interesting about the decision is that, although the learned judge concurred with the finding of the magistrates at first instance that the putative father applying for custody had no merits, he examined with meticulous care the various provisions of the Guardianship of Infants Acts and the previous authorities to decide whether the Acts could be construed as extending to illegitimate children. This is a welcome change from the cavalier treatment that the interests of children receive in some courts.

The learned judge also suggested that it might be desirable that magistrates should have jurisdiction over the custody and maintenance of illegitimate children, but added that if this were to be so, considerable modifications in the Guardianship of Infants Acts would be required.

The case of the illegitimate child is, indeed, the most extreme example of the lack in our law of independent jurisdiction by the courts over the child and the extent to which he is dependent not only on the rights inhering in his mother, but on her energy and success in asserting them. The mother of an illegitimate child has, indeed, now acquired something approaching the exclusive power over and responsibility for him that the father of a legitimate child possessed before 1839,[3] and it is only in the rarest and most extreme cases that any other person can intervene between them.

The Guardianship of Infants Acts, 1925, s. 1, provides (in respect of legitimate children) that in any proceeding before any court where the custody or upbringing of an infant . . . is in question, the court . . . shall regard the welfare of the infant as the first and paramount consideration. Unfortunately this section can be construed as referring only to questions arising as between the parents of the child or those appointed by them, and the principle is limited in application to illegitimate children,[4] whose welfare would seem to require especial consideration by the community. Research among delinquent children shows that an abnormally large proportion of such children are illegitimate.[5]

The learned judge also called attention to another provision which may be unfortunate when illegitimate children are concerned. By the operation of the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, the inherent jurisdiction of the Chancery Division, representing the Crown as *parens patriae*, cannot now be exercised in respect of any child who has not been made a Ward of Court.[6]

[2] 1886–1951.

[3] *R.* v. *Nash* (1880) 10 Q.B.D. 454, C.A. *Barnardo* v. *McHugh* [1891] A.C. 388; *Humphreys* v. *Polak* [1901] 2 K.B. 385, C.A.

[4] By the mother's exclusive rights; see *Re Carroll* [1931] 1 K.B. 317, 355, C.A.; *Re A.B.* (an infant) [1954] 2 Q.B. 385, C.A.; *Watson* v. *Nikolaisen* [1955] 2 Q.B. 286, D.C.; *Re M.* [1955] 2 Q.B. 479, C.A.

[5] See, *e.g.*, Lewis, *Deprived Children*. It was found that 23 per cent. of the children under examination were illegitimate, compared with between 4–5 per cent. of the population as a whole.

[6] *Re E.* (an infant) [1956] Ch. 23.

Even when the child is a Ward of Court, however, the cases in which the court will intervene between the infant and its parent are narrowly confined. In *Re Agar-Ellis*[7] Brett M.R. said that the court would intervene to deprive the father of his rights only where there was shown: (1) "That amount of immorality which convinces the court that he is not fit to claim his right as a father"; the headnote calls this "gross moral turpitude." (2) "Capricious countermanding of previous orders" which the headnote calls "abdication of parental authority." (3) "Seeking to remove the child from the jurisdiction of the court." In respect of legitimate children, the position has been radically altered by the rights given to the mother to claim custody of the child under the Guardianship of Infants Acts, but there has been no corresponding reduction in the rights of the mother of the illegitimate child, since no other person is in a position to challenge in private law her rights over and duties in respect of the child.[8]

If the law is ever amended so that in any proceedings concerning any child whatever the court is to regard the welfare of the child as the first and paramount consideration, it is to be hoped that provision may also be made that whenever a child is before the court, the court shall have power of its own motion to order applications to be made or the proceedings to be reconstituted so that whatever action the court may deem desirable can be taken to secure the welfare of the child.

O. M. Stone.

Illegality—Statutory Criminal Offence in Performance of a Contract

The judgment of Devlin J. in *St. John Shipping Corp.* v. *Joseph Rank, Ltd.*[1] contains the most important examination since the war of the circumstances in which a contract is affected with illegality where a statutory criminal offence was committed by the plaintiff in performing the contract.

The contract in question was one for the carriage of 10,000 tons of wheat from Mobile, Alabama, U.S.A., to Birkenhead in England.[2] In the course of the voyage the ship called at Port Everglades, Florida, for 600 tons of bunkers which submerged the vessel ten inches below the summer load line. On the evidence it was not improbable that the overloading was deliberate on the part of the shipowners when it was done but there was no proof that it was

[7] (1883) 24 Ch.D. 317, C.A.

[8] See, *e.g.*, Lord Evershed M.R. in *Re G.* (an infant) [1956] 1 W.L.R. 911, 916–917, C.A.

[1] [1956] 3 W.L.R. 870; (also reported in [1956] 3 All E.R. 683).

[2] There were more than one consignee and more than one contract in the case; they are lumped together here for the sake of convenience since the discussion of the major legal issues did not depend on the plurality of contracts and cargo-owners.

contemplated when the contract of carriage was made. By the time she reached Birkenhead in the winter zone, the ship's loadline was submerged by about eleven inches.

Thereby, although the vessel flew the tax-light Panamanian flag, a criminal offence was committed under the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, for section 57 extends the application of the provisions of that Act to " load line ships not registered in the United Kingdom, while they are within any port in the United Kingdom." The maximum penalty that may be imposed for submerging a merchant vessel below its loadline is, at present, £100 plus " such additional fine . . . as the court thinks fit to impose having regard to the extent to which the earning capacity of the ship was . . . increased by reason of the submersion," provided that such additional fine should not exceed £100 for every inch by which the loadline was submerged. Under the Act, therefore, the court of summary jurisdiction at Wallasey imposed on the ship's master the maximum fine of £1,200.

The freight payable for carriage of the entire cargo was £50,000. Of this, £2,295 freight was attributable to the extra 427 tons carrying capacity of the ship resulting from its having been overloaded. So, this extra freight calculated in accordance with 1956 monetary values more than covered the fine, the amount of which had been fixed with reference to money values in 1932. However, the cargo-owner, deciding apparently that some additional punishment should be inflicted on the plaintiffs, withheld payment of £2,295, and the shipping company sued to enforce the contract. Three heads of defence were pleaded: (1) that the contract was illegal and unenforceable because of the crime committed in its performance by the plaintiffs; (2) that the plaintiffs had to rely on their criminal conduct in pursuing their action; (3) that the £2,295 was a benefit directly resulting from the plaintiff's own crime.

(1) This, Devlin J. pointed out, was not the case of a contract itself directly prohibited by statute; nor was it the case of a contract concluded for the purpose of doing acts prohibited by statute, nor again that of a contract which, whatever the intent of either or both parties at the time of its formation, involved of necessity the commission of a prohibited act in its performance. This was a contract which was lawful in its inception and capable of lawful performance but which the plaintiffs had subsequently chosen to perform in a manner contravening the Act of 1932. The question, then, was whether the manner of performance, the criminal submersion of the vessel, affected the contract of carriage with illegality rendering it unenforceable as a whole.[3]

Following in particular the utterance of Parke B. in *Cope* v. *Rowlands*,[4] Devlin J. stated that the legal principle for determining this issue was that of " the true effect and meaning of the statute "

[3] The possibility of severance does not appear to have been pursued by defendant.
[4] (1836) 2 M. & W. 149, 157, 159.

(at 880): it was merely a matter of deciding whether the Act of 1932 properly interpreted might be said to have intended to prohibit a contract involving breach of the statute in its performance as in the present case.

The Act itself provided for an additional fine which, on 1932 money values, might reasonably be said to have been designed to mop up the illicit earnings of the ship. Moreover, section 44 refers to "earning capacity," thus suggesting, as counsel for the plaintiffs submitted, that the statute contemplated that contracts for the payment of freight were to remain alive notwithstanding breach of the statute. It is, I think, of some significance that the learned judge paid scant attention to these traditional straws hinting at the breath of Parliamentary intention. The statement of principle was made in formal nineteenth-century terms but its application was discussed predominantly in the language of twentieth-century functionalism.

In effect, as it seems to me, the question whether, in the absence of express provision, the Act of 1932 meant impliedly to prohibit the contract was translated into the question whether, in the circumstances of the case, it was desirable for the courts to reinforce the provisions of that Act through the doctrine of illegal contracts. This, I respectfully submit, is the real issue in the instant type of case, involving a decision of judicial policy.[5] In reaching these decisions, the courts have regard to various factors according to the kind of statute and transaction concerned. In holding that the criminality in the mode of performance did not affect the transport contract with illegality, Devlin J. mainly took three factors into account.

(a) The first was whether the object of the relevant statutory provision was to protect a class of persons which included the plaintiffs. The learned judge said that, "the statute being one which according to its preamble is passed to give effect to a convention 'for promoting the safety of life and property at sea,' it is therefore passed for the benefit of cargo owners among others" (at 880–881). This factor, however, is "one only of the tests" (881), and "no single consideration, however important, is conclusive" (881). In the circumstances of the case, Devlin J. saw fit to give no special weight to this particular factor.

(b) The second factor consisted of the possible consequences a decision one way or the other might have in the kind of maritime transaction that formed the subject-matter of the action; more especially, "the inconveniences and injury to maritime business which would follow from upholding the defendants' contention"

[5] A similar juridical problem is posed by the issue whether breach of a particular statutory duty should found an independent civil action for damages in tort. Where the statute is silent on the point, granting or withholding the additional civil sanction is not really a matter of divining what the intention of Parliament must have been but of determining what is now desirable in the relevant field of legislation.

(883). In the instant case, the consequent inconveniences and injury to maritime business would, in Devlin J.'s opinion, have been most startling and even calamitous.

"A shipowner who accidentally overloads by a fraction of an inch [would] not be able to recover from any of the shippers or consignees a penny of the freight." Moreover, "there are numerous other illegalities which a ship might commit": *e.g.*, under "section 24 of the Merchant Shipping (Safety Conventions) Act, 1949, which makes it an offence to send a ship to sea laden with grain if all necessary and reasonable precautions have not been taken to prevent the grain from shifting" (875–876); also, "the detailed regulations for the carriage of timber . . . which must be complied with if an offence is not to be committed under section 61 of the Act of 1932" (876). If defendants' contention were upheld, "the consequences to shipowners of a breach of the Act of 1932 would be as serious as if owners of factories were unable to recover from their customers the cost of any articles manufactured in a factory which did not in all respects comply with the [Factories] Acts" (876).

(c) The third factor consisted of the injurious consequences to business generally that would be likely to flow from a finding of illegality. Reference to the possible repercussions in manufacture is contained in the quotation above. Then, there would be the deleterious effects in other branches of the transport industry. The smallest infringement of the statutory regulations relating to the use, construction and equipment of road haulage vehicles would relieve merchandise owners from all liability for freight. "A service of trained observers on all our main roads would soon pay for itself" (876).

Devlin J. went on to consider that aspect of the case bearing on the general relationship between law and businessmen. "It may be questionable . . . whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression. Commercial men who have unwittingly offended against one of a multiplicity of regulations may nevertheless feel that they have not thereby forfeited all right to justice, and may go elsewhere for it if courts of law will not give it to them. In the last resort they will, if necessary, set up their own machinery for dealing with their own disputes in a way that those whom the law puts beyond the pale, such as gamblers, have done" (882).

In the light of all these considerations, Devlin J. cautioned that, "unless you get a clear implication . . . a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract" (882).

From this, the most important section of Devlin J.'s judgment, the conclusion may, in my respectful submission, be drawn that, in cases of this kind, the scope and purpose of the statute are

governing factors if they are clearly to be found in the statute, but that, in the absence of any clear, internal indication, it is left to the free discretion of the courts to decide the desirability or expediency of reinforcing the penalty established in the statute by a declaration that the contract in question is illegal.[6]

(2) Once it was held that the transport contract was not affected with illegality by the commission of the criminal offence, the second plea that the plaintiffs had to rely on their criminal conduct in pursuing their action was no longer relevant. For there is, it is submitted, no overlap within the doctrine of illegality between the primary determination of illegality and the reliance rule. The latter operates only when there has been a prior finding of illegality and normally lies in the mouth of the plaintiff arguing that, notwithstanding the illegality of the contract, his own claim might be supported without the need to rely on the element of illegality concerned.

However, Devlin J. hesitated to place such clear-cut limits on the scope of the reliance rule, and found against the second head of defence on the ground that the carrier, under a contract of carriage by sea, did not have to rely on the way in which the ship was loaded to claim his freight money: "the plaintiffs need show no more in order to recover their freight than that they delivered to the defendants the goods they received in the same good order and condition as that in which they received them" (884).

(3) The third plea rested on a rule extending in its application far beyond the bounds of the law of contract. Perhaps the best known illustrations of the rule that no man should be allowed to benefit from his own crime occur in the law of succession (*Re Crippen*[7]) and the law of life insurance (*Beresford* v. *Royal Insurance*[8]). The "benefit from a crime" rule does not technically form part of the doctrine of illegality: it is an independent rule which, especially where administrative criminal offences are concerned, contains the seeds of potential conflict with the doctrine of illegality, for that rule, unlike the doctrine, on the face of it gives the courts no discretion about the manner of its application.

However, Lord Wright in *Beresford*[9] and Denning L.J. in *Marles* v. *Trant*,[10] both seem to suggest *obiter* that the courts do have a discretionary power to refuse to apply the "benefit from a crime" rule where its enforcement is thought to be morally unjustified. Adverting to these dicta, Devlin J. said: "it is not clear that they go as far as saying that the application would not be justified in law" (885) and left this important point open,

[6] *Cf.* Lord Wright in *Vita Food Products* v. *Unus Shipping Co.* [1939] A.C. 277, 293.
[7] [1911] P. 108.
[8] [1937] 2 K.B. 197.
[9] *Ibid.*, at 220.
[10] [1954] 1 Q.B. 29, at 37–40.

since he found it possible to hold on other grounds that the rule did not apply.

The rule was stated by Devlin J. in these words: "For a right to money or to property to be unenforceable the property or money must be identifiable as something to which, but for the crime, the plaintiff would have had no right or title" (885), and, in the present case, the learned judge went on: "No claim or part of a claim can be clearly identified as being the excess illegally earned" (886). The reason for this conclusion appears to have been the impossibility of identifying the grains of wheat composing the 427 tons of excess load.

With great respect, this part of Devlin J.'s judgment seems too ingenious to be entirely satisfactory. It is true that "There is no warrant under the [rule] for a *pro rata* division" of the freight (886). But, equally, there is no prohibition under the "benefit from a crime" rule against a *pro rata* division, and £2,295 was plainly the result of the criminal offence. The additional distinction taken between the right to claim freight which was not brought into existence by the crime and the total amount of freight earned which was affected by the crime (at 886–887) does not seem justified by the broad terms of the "benefit from a crime" rule. This, in my respectful submission, was a case in which it needed to be said that the "benefit from a crime" rule is as much subject to policy considerations of morality, expediency and justice as the doctrine of illegality and in which the refusal to apply the rule should have been made for the same reasons that led Devlin J. to hold the contract of carriage to be lawful.

C. Grunfeld.

The Complement to *Re Wallach, deceased—Re Scullard, deceased*

It is stated in Dicey's *Conflict of Laws* that "a widow retains her late husband's last domicile until she changes it." [1] It now seems that this rule is more appositely worded to cover cases where the parties to the marriage were living together when the husband died [2]

[1] 6th ed., r. 11, sub-r. 2, p. 111. To the same effect are Schmitthoff, *The English Conflict of Laws*, 3rd ed., p. 90; Wolff, *Private International Law*, 2nd ed., para. 118, p. 121; Cheshire, *Private International Law*, 4th ed., pp. 176–177; Halsbury's *Laws of England*, 3rd ed., Vol. 7, p. 24. See also Goodrich on *Conflict of Laws*, 3rd ed., p. 78; *Restatement on Conflict of Laws*, para. 29.

[2] Thus it will be recalled that the deceased widow in *In b. Raffenel* (1863) 3 Sw. & Tr. 49, was held to have died domiciled in France in these circumstances: her French naval officer husband died, domiciled in France, in 1850. Thereafter, the widow, who had lived with her husband down to his death, stated often that she intended to return to England, the country of her domicile of origin. In August, 1853, she and her children left their Dunkerque home for Calais *en route* for this country. The deceased was taken so ill on board the boat that she had to land before it sailed from Calais. She remained in that town for three months, hoping to become well enough to make the channel crossing, but, when it become clear that this could never be, the family

than those where they were living apart.[3] This point of distinction is well brought out in the recent case of *Re Scullard, deceased*.[4]

The deceased had married a domiciled Englishman in 1893, and left him in 1908, never living with him again. Apparently he retained his English domicile until his death on February 4, 1955. The wife lived, after the separation, in various places until 1946 or 1947, when she went to live in Guernsey to be near one of her married daughters. She then stated that she intended to live out her life in Guernsey, and backed this up by bringing all her personal possessions and furniture to Guernsey and selling all her investments, reinvesting them in bearer bonds and War Stock, which she took to Guernsey. Further, the investments of two trust funds of which she was tenant for life were changed suitably in the hope of minimising death duties if she should die domiciled outside the United Kingdom; also a house was purchased in Guernsey for her occupation out of certain trust funds. The deceased never left Guernsey again before her death on March 19, 1955, *i.e.*, some six weeks after that of her husband. And—which is important to note—the deceased never knew that her husband had died.[5] At her death she was about eighty-six years old, and it seems that although she expressed no intention between the dates of her husband's death and her own of continuing to live in Guernsey for the rest of her days, she was sufficiently *compos mentis* to understand what she was doing until the last two weeks of her life. Danckwerts J. quoted extensively from the judgments in *Re Cooke's Trusts*[6] and *Re Wallach*,[7] and, after pointing out

returned to Dunkerque. The widow died in April, 1854. Sir C. Cresswell held: "I cannot think that the French domicile was abandoned so long as the deceased remained in the territory of France. It must be admitted that she never left France, and that intention alone is not sufficient."

A further case where the parties lived together until the husband's death and in which the widow continued to reside in the country of her husband's last domicile and was held to have retained that domicile is *Re Wallach, deceased* [1950] 1 All E.R. 199, 3 I.L.Q. 259, 14 *Conveyancer* 75. There, the widow's domicile of origin was either French or German, and she died in 1943 five days after her husband, whose domicile of origin was German, but who was found to have died with an English domicile of choice. He had come to this country in 1939. Hodson J., at p. 200, applied the Dicey rule quoted in the text.

Although in both these cases the parties lived together until the husbands died, it is thought that the decisions would have been no different had they been living apart.

3 Such a case is *Re Cooke's Trusts* (1887) 56 L.T. 737. There, W, an infant Englishwoman domiciled in England, married H1, a domiciled Frenchman, in 1839 at Boulogne. Six years later, they separated, W going to Jersey with her children to stay with her father in Jersey. In 1853, believing H1 to be dead, W married H2 and went with him to New South Wales. W died on February 1, 1879, in that State, still living with H2. H1 had in fact not died until January 7, 1877. On these facts, Stirling J. held W to have had a French domicile until the death of H1, whereupon she acquired a domicile of choice in New South Wales.

4 [1956] 3 W.L.R. 1060.

5 This is expressly stated in the statement of facts on p. 1062. Presumably in *Re Cooke's Trusts* (*supra*), W. did not know of the death of H1 in 1877.

6 *Supra.*

7 *Supra.*

that *Re Cooke's Trusts* [8] was not cited to the court in *Re Wallach* [9] [10] he set to work to reconcile these two cases, stating—

> "In *Re Wallach* . . . it is plain that the husband and wife had not parted; they were living evidently together until the husband's death and, therefore, there was obviously during the lifetime of the wife no conscious effort or intention on her part of any kind to change her domicile . . . she was living with her husband, committed to live with him, and used his domicile, as far as she exercised her mind at all. On the other hand, in *Re Cooke's Trusts* . . . the wife had been parted many years from her husband, believed him to be dead, so during the lifetime of her husband had an overt intention to change her domicile to that of one in New South Wales, and, therefore, had shown an intention which was entirely absent in (*Re Wallach*)." [11]

He then concluded that the deceased had made plain during her lifetime her intention of making her permanent home in Guernsey, that she had been prevented by the rule of law that a wife's domicile is dependent upon that of her husband throughout coverture from acquiring a Guernsey domicile during her husband's life, and that he did not see

> "why it should not be assumed that her intention continued after the death of her husband, and why one should come to the conclusion that some new overt act was required when all previous evidence is consistent with there having been no different intention during her life. Accordingly . . . I have come to the conclusion that the testatrix had an intention to acquire a domicile of choice in Guernsey and that that intention was effective in law." [12]

There appear to be two further possible permutations of facts which may require solution in the future. The first is that of the widow who is separated from her husband at the time of his death, living in a country other than that of his last domicile but (unlike Mrs. Scullard), without any *animus semper manendi* in that country. It is thought that there are here strong grounds for holding that the argument is correct that the widow's domicile of dependence on her husband was "a sort of mantle which she wears during her coverture only, and that when she becomes a widow she reverts automatically to her domicile of origin." [13] There is authority for this proposition in an *obiter dictum* of Stirling J. in *Re Cooke's Trusts* [14]: he says of the wife that, even if she were not domiciled (as he thought she was) in New South Wales at her death, her domicile was not French and continued:—

[8] *Supra.*
[9] *Supra.*
[10] At p. 1067.
[11] *Ibid.*
[12] At p. 1068.
[13] This was put forward by counsel in *Re Wallach, deceased* (*supra*) but was rejected by Hodson J.—it is submitted correctly on the facts of that case.
[14] *Supra.*

> "Her French domicile was an acquired one, and consequently capable of being abandoned without the necessity of acquiring a new domicile of choice. (She) from 1846 or earlier ceased to reside in France and went to reside permanently elsewhere, and consequently she had during the last two years of her life, *animo et facto*, put an end to her French domicile, *and if she did not acquire a domicile in New South Wales, her domicile of origin, which was English, would revive according to the decision in Udny* v. *Udny* (L.R. 1 Sc.App. 441)." [15]

The second permutation is suggested by *Gout* v. *Zimmerman* [16]— a wife lives with her husband, in a country in which he is not domiciled, until his death and continues to live there after his death. In that case, a testatrix, of uncertain domicile of origin, born at Smyrna, of Dutch or Russian parents residing there, under the protection of the Dutch consulate at Smyrna, married a British subject. After his death, she continued to reside in the Levant. It was held that her "British domicile" [17] acquired by marriage had not been changed, nor had her domicile of birth reverted. This is, of course, an old case decided before the modern rules as to domicile were settled; it reflects the contemporary provincial outlook which virtually prevented the loss of a domicile in this country, especially where the domicile alleged to have been acquired was in an oriental country,[18] and, probably, also a desire on the part of the Prerogative Court not to refuse jurisdiction in respect of a will in English form of the wife of a British subject disposing of property situated in England. It is thought that a court confronted today with similar facts would hold that, even if the husband did not die domiciled in Turkey but in this country, the wife's domicile of origin would automatically revive upon her husband's death, or, more likely, that since she resided in Turkey until her death, she died domiciled there as there is a strong presumption that a person is domiciled in the country where he or she resides. It certainly seems odd to hold an adult widow domiciled in a country to which she may never have been, but Sir H. Jenner Fust in *Gout* v. *Zimmerman* [19] seems to envisage the possibility of this state of affairs when he says that the widow must do some act "whereby she divested herself of the character she acquired by her marriage."

In order to ascertain the domicile of a widow after the death of her husband, it seems that possibly the most useful guide is the presumption that a person is domiciled in that country in which

[15] At p. 739. Italics supplied.

[16] (1847) 5 *Notes of Cases* 440. This case was referred to by Hodson J. in *Re Wallach, deceased* (*supra*), at p. 200, and Danckwerts J. repeated this reference in *Re Scullard, deceased* (*supra*), at p. 1066. But neither judge commented on the decision beyond saying that the argument referred to in n. 13, *supra*, was not advanced in *Gout* v. *Zimmerman*.

[17] These are the actual words of the headnote.

[18] See now *Casdagli* v. *Casdagli* [1919] A.C. 145.

[19] *Supra*, at p. 447.

he or she is then resident; further assistance may be forthcoming by asking whether the parties were separated during their lifetimes and whether the widow continues to reside in the country where the husband was domiciled when he died.

The following conclusions are submitted—

(a) W resides in State A. H and W were domiciled and resident in State A when H died. W's domicile will continue to be in State A, as a domicile of choice, until she acquires a new domicile of choice or her domicile of origin revives.

The result is the same whether or not they were separated when H died.[20]

(b) W resides in State A. H dies domiciled and resident in State B, *i.e.*, the parties are separated. W automatically acquires a domicile of choice in State A if she can be shown to have the necessary *animus semper manendi*.[21] If this is not possible, then her domicile of origin will automatically revive.[22]

(c) W resides in State A. H died domiciled in State B, but resident in State A. Prima facie W becomes domiciled as of choice in State A or her domicile of origin revives.[23] The final answer may here depend on whether the parties were separated before the husband's death, whether the wife had ever been to the country of her husband's last domicile, and so on.

P. R. H. Webb.

Tortfeasors' Charter Upheld

The case of *Ashdown* v. *Samuel Williams & Sons, Ltd.* which was noted and criticised in (1956) 19 M.L.R. 532, went to appeal after all.[1] As a result the Court of Appeal [2] have upheld the dismissal of the plaintiff's claim against the occupiers of the land and allowed the appeal of the employers. Accordingly the unfortunate plaintiff failed *in toto*.

It will be remembered that this was the case in which a licensee on land had been injured as a result of negligent shunting operations carried out by the licensor. The plaintiff was nevertheless held to fail in her claim against the licensor because of a warning notice disclaiming liability for injury however caused. The arguments, as I saw them, against this decision, and the possible consequences of it, were summarised in the earlier note. The judgments of the Court of Appeal do not attempt to deal with them, for counsel

20 As in *In b. Raffenel* and *Re Wallach, deceased* (both *supra*).
21 As in *Re Cooke's Trusts* and *Re Scullard, deceased* (both *supra*).
22 Inference from *Re Cooke's Trusts* (*supra*).
23 But see *Gout* v. *Zimmerman* (*supra*) to the contrary.
1 In stating (in (1956) 19 M.L.R. at 535) that an appeal was unlikely, I had stupidly ignored the probability that the second defendants (the employers) would force the issue by appealing against the judgment against them. This in fact occurred, leading to an appeal by the plaintiff against the judgment in favour of the first defendants.
2 [1956] 3 W.L.R. 1104. Also reported [1957] 1 All E.R. 35.

for the plaintiff did not seriously dispute that the notice would be effective if its terms were sufficiently wide to cover active operations on the land and if these terms had been adequately brought home to the plaintiff. Accordingly the court could say [3]: "It is not in dispute that it is competent to an occupier of land to restrict or exclude any liability he might otherwise be under to any licensee of his. . . ." For this proposition *Wilkie* v. *L.P.T.B.*[4] which had not been cited in the court below and to which attention was drawn in the earlier note, was brought in to reinforce *Parker* v. *South Eastern Ry.*[5] which was clearly distinguishable as the licence there was contractual. Despite *Wilkie's* case it is respectfully submitted that there should have been very serious dispute as to whether this was good law. *Wilkie's* case was hardly a decisive authority for the proposition.[6] But unhappily the law must now be taken as settled until the House of Lords have an opportunity of reviewing it or unless something is inserted in the Occupiers' Liability Bill to cover the point. That the present position is unsatisfactory has the powerful support of Prof. A. L. Goodhart,[7] and both Jenkins and Parker L.JJ. expressed regret at the conclusion to which they thought they were forced.[8]

As the case was argued, therefore, everything turned on whether the notice was adequately drawn to the plaintiff's attention and on whether its terms were sufficiently wide to cover liability for negligence. The court held that since part of the notice had been read by the plaintiff she was bound by the whole of it and that the words of the notice were only susceptible of the interpretation that liability from negligent shunting operations was included. Adequacy of knowledge was to be tested on the same principles as in the contractual cases,[9] and it was not true that a licensee is only bound by conditions of which he has actual (as opposed to constructive) knowledge.[10]

As regards the appeal of the employers, the court had little difficulty. They did not deny that an employer might, in some circumstances, be liable for the safety of an employee while on the way to work.[11] But here the employers had provided a reasonably safe means of ingress and were not negligent in not warning of the patent dangers involved in crossing railway lines.[12]

[3] *Per* Jenkins L.J. at p. 1112.
[4] 63 T.L.R. 115; [1947] 1 All E.R. 258, C.A.
[5] (1877) 2 C.P.D. 416.
[6] See (1956) 19 M.L.R. at 536.
[7] (1956) 72 L.Q.R. 470 at 471.
[8] See pp. 1117 and 1120.
[9] *Per* Jenkins L.J. at p. 1116; *per* Parker L.J. at pp. 1118–1119.
[10] Citing *Parker* v. *S. Eastern Ry.*, *supra*, and *Henson* v. *L.N.E.R.* [1946] 1 All E.R. 653.
[11] *Per* Jenkins L.J. at p. 1116; *per* Parker L.J. at p. 1120.
[12] Singleton and Jenkins L.JJ. also took the point (made in (1956) 19 M.L.R. at 537) that in any case she had been warned—by the landowner's notice: see pp. 1109 and 1117. Singleton and Parker L.JJ. also doubted if any causal connection had been established between the accident and any failure to warn: see pp. 1109 and 1121.

In conclusion it may be permissible to point out that the case affords a typical illustration of the English practitioners' lack of interest in periodical literature. Some time before the appeal was argued the decision in the court of first instance had been the subject of lengthy notes, by Professor Goodhart in the *Law Quarterly Review*, and in this *Review*. Neither note was cited and plaintiff's counsel was not even aware of them. This would not occur, I believe, anywhere else in the civilised world. In some of the Dominions, for example, the notes would have been referred to and replied to in the judgments themselves. I am not complaining; we do things differently here. But if practitioners choose to ignore academic writings they must not complain if academics criticise the result.

L. C. B. G.

REVIEWS

ESSAYS ON THE LAW OF EVIDENCE. By Z. COWEN, Barrister-at-Law, Professor of Public Law in the University of Melbourne, and P. B. CARTER, Barrister-at-Law, Fellow of Wadham College, Oxford. [Oxford: Clarendon Press; London: Cumberlege. 1956. xx and 278 pp. (with index). 35s. net.]

MUCH of the matter comprised in the nine interesting essays in this volume has previously appeared in the form of articles or notes in legal periodicals, either under the name of Professor Cowen or of Mr. Carter or under both their names. As essays formerly published by one author now contain references to "the present writers," the learned authors are presumably to be regarded as expressing joint views. Contributions to periodicals have been revised, though to what date is not always certain; nor is much light thrown on this minor mystery by the preface, which is dated January 1, 1955. The year may not be a slip, for the text refers to the absence from England of both authors during the correction of proofs; but as reports of cases decided later in 1955 are cited in two postscripts (pp. 103, 269), there is some ground for thinking that the essays represent matured conclusions on the state of the law immediately preceding publication early in 1956.

The first essay, on statutory modification of the law of hearsay, is mainly occupied with the Evidence Act, 1938, but it also discusses American enactments and proposals. The references to the Model Code of Evidence remain unaltered, though the authors' views on the relevant American Uniform Rules of 1953 would also have been of interest. The next essay deals with confessions and their confirmation by subsequent facts. On the subject of confessions generally, the authors hold it to be better that a few guilty persons should go unpunished rather than that the encroachments of the Police State should be tolerated; and that a confession, whether reliable or not, should be excluded if improperly obtained (p. 70). Many lawyers will agree, though the limits of improper procurement by the police must remain debatable. The discussion of comparative law and opinion in this connection might have been heightened by reference to the Indian Evidence Act, 1872, which makes inadmissible any confession to a police officer (s. 25) and also any confession made by a person in the custody of the police unless it is made in the presence of a magistrate (s. 26). The third essay considers evidence procured through illegal searches and seizures; and academic opinion will probably support the authors in their disappointment that the Privy Council recently decided in favour of admissibility without discussing all the aspects of this complex problem (pp. 104, 105).

The fourth essay reproduces, with some rearrangement, Mr. Carter's long article on evidence of similar facts, and concludes with a new summary. It is suggested that his contention as to the scope of propensity is open to question; for example, to speak of a propensity to keep on knowing (p. 134) seems to strain the English language. And his further argument, that the admissibility of evidence of similar facts should not be determined by the issue (pp. 140, 161), while doubtless defensible in theory, appears to discard a useful practical rule, for which there is the sanction of both the courts and the legislature, as when the issue is guilty knowledge. In the fifth essay the authors have harsh things to say ("unmeaningfulness"; "nonsense"; pp. 162, 164) about the rule which sometimes excludes evidence of opinion. In the sixth they are concerned with the inadmissibility of evidence of convictions in subsequent civil proceedings—a rule apparently inconsistent with the use of such evidence in appropriate circumstances to show the bad character or

conduct of an accused person, or to discredit a witness in any court, as the writers point out (pp. 184, 186). They could not be expected to foresee that a civil court of first instance, in *Ingram* v. *Ingram* [1956] P. 390, would admit evidence of a conviction on the ground of relevance to desertion in proceedings for divorce. The seventh essay considers unsworn statements by the accused; a subject upon which some suggestions could be gathered from a perusal of the neglected reminiscences of the late Lord Brampton, whose Victorian clichés seem to one reader less inelegant than such contemporary constructions as "policy considerations" and "fact situations."

In the eighth essay the authors deal with the re-enactment of the privilege in regard to answers concerning adultery, and the new statutory rule on evidence of marital intercourse. Here their views on *Re Jenion* [1952] Ch. 454, in the Court of Appeal, would have been welcome. Lastly, there is a discussion of some recent decisions on the quantum of proof in criminal and matrimonial cases. This is preceded by general observations on the burden and standard of proof, including a distinction between the legal burden and the tactical burden. Though the adjectives vary with different writers, this conventional distinction is often repeated; but has the distinction any validity? There is ground for contending that these two burdens, so far as the proponent of an issue is concerned, are merely the same burden viewed at different stages of the trial. Then does not the statement that "the rules governing quantum relate to the summing-up" (p. 243) require some qualification? A question of quantum may arise in trials where there is no summing-up, or in any trial on a submission of no case to answer. But perhaps elaborate exposition should not be expected in the few introductory pages allotted to these topics.

The publication of these essays naturally recalls other collections wholly or partly concerned with evidence; such as Thayer's posthumous *Legal Essays*, Wigmore's survey in *Select Essays in Anglo-American Legal History*, and Professor Morgan's contributions to *Selected Essays on the Law of Evidence*, republished in 1949. But comparison here might be tedious as well as odious, and the reader may prefer to regard this collection as *sui generis*.

As the treatment in the essays reviewed is mainly expository or comparative, comment must be confined to either a consideration of detail or a discussion of principle. Neither can be adequate within available limits, and the brief suggestions in earlier paragraphs of this review must not be regarded as indicating any want of appreciation of the scholarly quality of the essays, or of the erudition and enterprise of the essayists. The essays cover an extensive area; their range is wide not only in subject but in jurisdiction, for the authors have drawn upon enactments and decisions in England and Scotland, in the Commonwealth and the United States of America; and they illuminate numerous obscure passages in that labyrinth known as the law of evidence.

G. D. Nokes.

Capital Punishment as a Deterrent: and the Alternative. By Gerald Gardiner, Q.C. [London: Victor Gollancz, Ltd. 1956. 95 pp. 5s. net.]

Reflections on Hanging. By Arthur Koestler. [London: Victor Gollancz. 1956. 193 pp. (with index). 12s. 6d.]

The renewal of the campaign for the abolition of capital punishment for murder which began in 1955 has brought forth a number of books on the subject. Among the best of these are the two under review.

The names Gardiner, Gollancz, Koestler cover a majority of those who have been so successful in conducting this campaign. If one were to add Sir Ernest Gowers, Chairman of the Royal Commission, whose report made an unanswerable, or at any rate an unanswered case, against the death sentence, and who

has himself described in another volume how the evidence collected by the Commission gradually converted him to favour abolition, and Sidney Silverman, M.P., who has been leading the movement with skill and resourcefulness in Parliament one would, I think, have the names of the stars in the team which has been sweeping the country along with it towards the goal which penal reformers have been making for during a hundred years and more.

Mr. Gollancz has told us how the campaign originated in the enthusiasm of Mr. Koestler. Mr. Gardiner, Q.C., one of the most successful advocates now practising at the bar, has throughout the post-war period lent the weight of his legal authority to this campaign at a time when it was sorely needed as a counter to the diatribes of a diehard protagonist of hanging in the person of Lord Chief Justice Lord Goddard. It is fitting, therefore, that we should have volumes from Messrs. Gardiner and Koestler and that Mr. Gollancz should publish them.

The two volumes cover much the same ground—in spite of its title Mr. Gardiner's book is not limited to an analysis of the alleged unique deterrent effect of capital punishment. In both volumes there is some history: indeed Mr. Koestler draws substantially on Dr. Radzinowicz's great history: there is a considerable discussion of the deterrence aspect, which is convincingly shown to be much less strong than is often supposed: there is a survey of foreign experience, largely derived from the Report of the Royal Commission: there is a rather shorter treatment of such matters as retribution which, although described as secondary, each author seems to regard as furnishing the emotional drive which has kept hanging alive: there is a valuable disquisition on "the alternative" (imprisonment) as it works out in practice in the British prison system, and in the light of the psychological character of murderers.

Mr. Gardiner has a short and not completely convincing section on the proposal to establish grades of murder, a possible solution to the problem which does in fact work not altogether badly in quite a number of foreign States, and the treatment of which was one of the less satisfactory aspects of the Report of the Royal Commission. Mr. Koestler has an exceedingly interesting philosophic discussion on free will and determinism in relation to murder and its punishments which, so far as I know, is quite original. He also has an important and well-argued chapter on the chances of the verdict being wrong in murder trials (a possibility only glanced at by Mr. Gardiner). In this he not only analyses a number of important recent cases such as those of Rowland and Evans, but calls in aid testimony given by Kelly C.B. before his elevation to the Bench, in front of the Royal Commission of 1864, to the effect that "it is not in any way reasonably to be doubted that in many instances innocent men have been capitally convicted." The late Professor Borchard of Yale published a valuable study on similar lines during the 1930s, and, while his cases were for the most part taken from other jurisdictions than those of Great Britain, there is no reason to suppose that trials here are so much more satisfactory than those taking place abroad that similar mistakes may not occur here from time to time. It is usual for the protagonists of hanging to pooh-pooh the possibility of a jury going wrong in a murder case, and Mr. Koestler quotes a passage from a speech made in the House of Commons by the present Lord Chancellor, then Sir David Maxwell Fyfe, during the course of which he said "there is no practical possibility of justice miscarrying." There can be little doubt that this is an over-optimistic estimate, and Mr. Koestler has performed a real service by exposing the other side of the medal, even if he in his turn over-emphasises the possibility of mistake.

The contrast of style is fascinating. Mr. Gardiner is the embodiment of lucid careful argument, though the strong humanitarian feeling which has inspired his work for the cause is not difficult to sense through the argument. Mr. Koestler's passionate advocacy is emotionally more moving, if less intellectually satisfying. There are in his volume many gleams from that vivid style which made *Spanish Testament*, *Scum of the Earth* and *Darkness at Noon*

best sellers in their day. A good deal of his work appeared in a series of articles published in the *Observer*. These suffered from the distortions sometimes caused by over compression, and the fuller development of the argument presented in the book is both more convincing and more satisfactory stylistically; a number of apparent errors in the articles turn out to be due to the same compression. Unfortunately, a rather serious error over the execution of Mrs. Thompson which was cleared up by the Home Office after the appearance of the *Observer* articles has not been corrected in the text, no doubt because the printing was already too far forward for a change to be made. A correction does, however, appear on a loose slip of paper which also gives a fuller extract from the Home Office instructions to prison governors on the contents of their reports of executions than that appearing in the text of the book. This slip ought to have been gummed in as it might easily get lost. It is a pity also that Mr. Koestler's manuscript was not looked over by a lawyer. It contains a number of trivial inaccuracies of the kind which are irritating to a lawyer. Among these is the promotion of Collins L.J. to be L.C.J. and a general inability to distinguish a Lord Justice from a Law Lord. Martin B. is promoted to the House of Lords at p. 41, and Bramwell B. reaches that august tribunal many years ahead of his time. The Committee on Corporal Punishment was the Cadogan not the Atkins Committee, and the legal Assistant Under-Secretary of State at the Home Office, not Sir John Anderson's assistant, who gave evidence before the Select Committee of 1930, was Sir Ernley, not Sir Erney, Blackwell. The book is unfortunately littered with errors of this kind which a careful revision by a knowledgeable reader would have avoided. However, they detract only to a very limited extent from the genuine merits of a book which cannot but impress even the doubting reader with the passionate sincerity of its appeal.

C.

Juvenile Offenders Before the Courts. By Max Grünhut, Reader in Criminology in the University of Oxford. [Oxford: Clarendon Press. London: Cumberlege. 1956. viii and 143 pp. 21s.]

Statistics concerning crime must not merely be assembled and interpreted with the utmost care; their evaluation requires, it seems to me, nothing less than wisdom. When all the relevant data appear to have been marshalled and co-ordinated, there remains the human factor; as Mr. Grünhut writes in this important study: " Where the motivation of human actions and reactions are the issue, there will never be a complete and unchallengeable answer." In criminal courts an infinite variety of subjective elements is invariably at work, and that is so not only at the so-to-speak " receiving " end, but equally among those entrusted with the administration and enforcement of justice.

Juvenile Offenders Before the Courts is a sociological study but it might be said that—unlike others—it concerns itself primarily with the judges rather than the criminals. The author, with the support of the Home Office and the University of Oxford Social Studies Board, has undertaken an investigation into the practice of juvenile courts over the three-year period from 1948–1950 so far as concerns the methods of treatment adopted towards juveniles brought before them. Local variations and divergences in the use, in different parts of the country, of the magistrates' powers either to discharge an offender, to apply constructive, educational measures, or to resort to punishment are set against the geographical incidence of crime in high and low delinquency areas. Clearly such an attempt to establish whether there is any significant relation between the characteristic sentencing practice of individual courts on the one hand and delinquency patterns on the other can eventually yield valuable pointers for an assessment of the effectiveness of the work of juvenile courts in this country.

The framework around which the present study is built consists of a large number of elaborate statistical tables and calculations based on official returns, and local figures are brought to the touchstone of the national ones which express the experience of the country as a whole. Unfortunately, as Mr. Grünhut explains, a comparison of the small figures for particular forms of treatment in the juvenile courts of each of the thousand-odd petty sessional divisions is not feasible; the basic unit of research is therefore the individual police district. This is likely to have ironed out certain extreme, not to say freakish divergences, but even so the emerging picture is one of considerable, indeed striking, contrasts in judicial treatment practice. To give but one instance: while in Rotherham District magistrates imposed fines on no fewer than 72·5 per cent. of all juvenile offenders not discharged by the court and probation on only 18·6 per cent., in Merionethshire, by contrast, the rate of probation amounted to 88 per cent. and fines to only 2·4 per cent.

As Mr. Grünhut is careful to point out, the mere fact of difference in the sentencing practice of magistrates' courts is not necessarily something wrong in itself: his survey shows that the problems confronting justices differ qualitatively in different districts. "Evidence confirms," he writes moreover, "the personal view of an experienced Chief Constable that, where magistrates are faced with smaller and more easily manageable numbers of juvenile delinquents, conditions are favourable for elaborate consideration of individual cases and thus for a frequent use of probation. In large and densely populated districts with a great amount of delinquency, magistrates have to dispose of a considerable number of young culprits before they are able to concentrate on cases which call for individual inquiries with a view to a possible probation order." Quantitive analysis by itself is therefore not enough and, before the author allows himself to draw any general conclusions, or even to establish a number of "working hypotheses" arising out of divergences in the practice of different courts, the "local diagnoses" have been supplemented by field work providing several hundred individual case histories.

Even then *Juvenile Offenders Before the Courts* does not pretend to evaluate the suitability of magisterial action or even to put forward any universally applicable solution; Mr. Grünhut describes his findings, important though they are, as nothing more than "a first preliminary orientation" to suggest the lines along which future research should be undertaken. This admirable restraint makes the quite unusual value of this book and sets it apart among statistical investigations as a model to be studied and followed. It also lends profound conviction to the few suggestions which are here put forward. A high proportion of absolute discharges, for instance, so Mr. Grünhut holds, weakens the healthy fear inspired by a juvenile court. Empirically, what is more, it has been established that a "district making frequent use of discharge and sparing use of probation has a smaller success rate for boys with a bad personal background than other areas under observation." In view of the post-war trend away from probation and in favour of fines, one hopes that the utmost attention will be paid to the suggestion in *Juvenile Offenders Before the Courts* that "the figures are a challenge to areas with a preference for absolute discharge and fines to re-examine the situation with a view to new experiments in treatment practice."

H. A. Hammelmann.

NEGLIGENCE. Third Edition. By J. Charlesworth, LL.D. [London: Sweet & Maxwell, Ltd. 1956. 638 pp. £4 4s.]

This new edition brings the law of negligence up to date (March 1956) in a thoroughly reliable and complete manner. The author shows wonderful skill in reproducing the facts of cases in the shortest space with absolute accuracy. Unlike so many practitioners' books, this is no mere collection of facts of decided cases, but a critical survey of the principles of the law of negligence.

Where necessary, the author does not hesitate to subject to serious criticism recent cases; *e.g., Moore* v. *Fox, Ball* v. *L.C.C., Rands* v. *McNeil.*

There are two issues of principle which one must take up. First, the learned judge devotes hundreds of pages to cases dealing with the liability on highways, in schools and of various occupations and so on. He maintains that all these decisions settle points of law. He contends that to deny this is to assert that the only legal rule on standard of care is that of the reasonable man. But is it inconsistent to refute his argument and yet maintain that there are further general rules of law on the standard of care, *e.g.,* that the courts must consider the gravity of the threatened harm, the likelihood of injury, the practicability of avoiding harm, the practice in the trade, and the like? Surely the many distinguished judges such as Lord Greene and Lord du Parcq who have condemned attempts to transform decisions on fact into rules of law, and who have shown the unfortunate results of such attempts, are correct. It is perhaps significant that the only authority on which the author relies in support of his view is, with respect, not on the point: when, in *Lochgelly Iron Co.* v. *M'Mullan* Lord Atkin held that there was a duty to support a roof, he so held because he was dealing with an action for breach of statutory duty where the statute in terms imposed such a duty; obviously, that was a legal duty, but it affords no guidance to whether there are similar common-law duties in negligence.

Secondly, Judge Charlesworth maintains that the law knows a category of dangerous things common to both negligence of the *Dominion Natural Gas Co.* v. *Collins* type of case, and *Rylands* v. *Fletcher.* It is submitted that there is no warrant for this; that *Rylands* v. *Fletcher* is entirely separate from negligence. It is sufficient to observe that the author is driven to maintain that many of the established legal rules, *e.g.,* that the user in *Rylands* v. *Fletcher* must be non-natural, are incorrect.

The book does not always maintain its high standard when expounding the ratio of cases. *Eggington* v. *Reader* made no reference to whether the motorist was an "agent" (p. 77); *Elliott* v. *Hall* did not decide that carriers discharged their duty in respect of the structure by a warning (p. 113); *Wringe* v. *Cohen* was not a case on the duty of occupiers (p. 152); *Carmarthenshire C. C.* v. *Lewis* did not decide the duty of pedestrians to vehicle users (p. 515); in *Olsen* v. *Corry* the defence of *volenti* did not fail because the infant made no binding contract (p. 540—*Murray* v. *Harringay Arena* should have been discussed here); *Burgess* v. *Florence Nightingale Hospital* confirms that the ratio of *Sykes* v. *N.E. Ry.* is other than that set out at p. 558. The principles decided by *Hemmings* v. *Stoke Poges* and *Smith* v. *B.E.A.* are stated too widely at pp. 454 and 563 respectively. *Stevens* v. *Chown* (not *Clown,* p. 442) covers liability at common law; the statement at p. 407 that "it does not follow that the person who is regarded as the employer for the purpose of being held liable for the negligence of the servant is the same person as the employer who is regarded as liable for injury to the servant" should be reconciled with *O'Reilly* v. *I.C.I.*; your reviewer is not convinced that *Donoghue* v. *Stevenson* has overruled *Konskier* v. *Goodman* (p. 292).

Statutory changes have not always been noted; *e.g.,* the extension of the Carriage by Air Act to "national carriage"; the Acts on houses unfit for human habitation; there is something amiss with the Gas Act footnotes at p. 305; a detailed examination of the duty in respect of railway platforms should include the Conditions of Issue of Platform Tickets.

The section on contributory negligence of infirm persons is difficult to follow. Dr. Charlesworth appears to assume that physical and mental infirmities are ignored when finding duty to take care; he then notes that they are relevant in contributory negligence, and concludes: "It is not easy to understand on what principle the view can be taken that the standard of care in contributory negligence on the part of old, young or infirm persons, depending as it does on forseeability, can differ from that of normal persons. It

may well be, however, that the standard of care is based on the foreseeability of damage to normal people, although it is known that the halt, the maim and the blind, the deaf, the old and the pregnant woman exist, some measure of compensation is given to them for their exclusion from consideration when the general principle of liability is formulated by extending somewhat in their favour the rule of contributory negligence" (p. 530). But whatever this quotation means, is it correct that these infirmities are ignored when fixing the defendant's standard of care? The blind motorist is negligent in driving a car at all; on the other hand, if a blind person walks on a valuable package on the pavement when taking the reasonable care of a blind person, although a sighted person taking due care would not have damaged it, it is thought that the blind person would not be liable. Similarly, we cannot agree that *Phillips* v. *Whiteley* was wrongly decided (p. 30).

It takes more space to formulate criticisms than to bestow merited praise. This must not be allowed to give the wrong impression; the author has done a splendid job in bringing up to date this important and valuable survey of Negligence.

HARRY STREET.

SLATER'S MERCANTILE LAW. Thirteenth Edition. By LORD CHORLEY, M.A., of the Inner Temple, Barrister-at-Law, formerly Sir Ernest Cassel Professor of Commercial Law in the University of London, and O. C. GILES, LL.M. [London: Sir Isaac Pitman and Sons, Ltd. 1956. xlv and 466 pp. (with index). 30s. net.]

THIS is the thirteenth edition of a general treatise on mercantile law designed for the business man and commercial student rather than the specialist. It is not surprising to find, therefore, that the opening pages are devoted to a survey of the sources of mercantile law and an outline of its historical development. Then follows a list of the topics to be treated in the book, and the reader at once notices the extremely broad terms in which the subject-matter of mercantile law is defined. An attempt has been made to refer the student to all those branches of the law which may be of some interest to the person engaged in commerce. Not only does the book deal with the specialised forms of mercantile contract and the three main types of commercial relationship (namely agency, partnership and company) but substantial sections are devoted to a study of commercial securities and an outline of bankruptcy law. Finally, in a miscellaneous section of some forty pages, an attempt is made to cover such varied topics as arbitration, shipping, patents, trade marks, copyright and certain tortious remedies for injury to goods.

Painting on such a large canvas, the authors cannot be expected to give more than a brief outline of the peripheral subjects. One is left with the impression that it might have been preferable to reduce the scope of the survey rather than to give an over-simplified account of some of these marginal subjects. An interesting consequence of this policy is to be seen in the fact that the four pages in the text devoted to "passing off" and slander of goods, have necessitated an extra two pages in the Introduction to explain the basis of tortious liability. Again, the need for extreme conciseness has shown itself in some rather stilted paraphrasing of statutory provisions, and the tendency to tabulate strings of facts under numerical headings. This is especially noticeable in the section devoted to company law and, while to some extent unavoidable, it does not improve the readability of the book. A further result has been the insertion of the names of relevant cases in brackets at appropriate points in the text—though the reader has to turn to the Table of Cases in order to discover the exact reference. These case references, intended for the student

who wishes to pursue the subject further, tend to underline the inadequacy of certain portions of the text, as, for example, in the chapter on liens (at p. 332).

These criticisms do not, however, detract from the essential merits of the main body of the work. The present editors are to be congratulated on producing a book which is eminently suitable for the purpose for which it is designed. Despite the comprehensive nature of the work, the main principles of law have been clearly and simply stated, while the reader has not been overburdened with a mass of irrelevant detail. Large portions of the present edition have been either rewritten or substantially revised, including the two largest sections on Contract and Company Law, and there can be no doubt that they have been considerably improved in the process. It is interesting to note that almost a quarter of the text has been devoted to a treatment of the general principles of the law of contract—an essential prerequisite for any general study of commercial law.

Several factors contribute to making the present edition eminently readable. The style is attractive, and there is a pleasant absence of footnotes and marginal headings which tend to distract, if not even positively to deter, the reader interested primarily in general principles. Such a person will no doubt also be attracted by the attempt to give practical illustration wherever possible. Thus specimen forms of the main types of mercantile contract are provided, including those of a bill of exchange, a charterparty, a bill of lading, an insurance policy and a conditional bill of sale. Moreover, considerable improvement has been achieved by inserting the facts of some of the more important cases in the appropriate section of the text rather than, as before, reserving them for a separate chapter at the end of the book. Finally, the reader is provided with a most adequate index and a copy of the provisions of the Factors Act and the Sale of Goods Act.

The commercial student who turns to this book will be amply rewarded. He will find a comprehensive and accurate survey of the main principles of mercantile law presented in a most attractive form. There can be no doubt that the thirteenth edition of this work will be as successful as its predecessors.

J. F. Wilson.

The Law of Carriage by Inland Transport. Third Edition. By Otto Kahn-Freund. [London: Stevens & Sons, Ltd. 1956. xxxii and 472 pp. 35s.]

In this edition the author has had to record the truly revolutionary changes in the organisation of the transport industry which have taken place since the last edition appeared in 1949. This difficult task has been discharged with great skill and learning. The book has grown by more than a hundred pages, which has enabled the author to describe in detail the complex structure of the industry and to give a lucid explanation of the underlying principles and policies. He has also noted developments in other fields which have affected the law of transport. One of the most interesting of these developments is the doctrine of fundamental terms which the author adopts to explain the effect of deviation although he does not explain the difference between a fundamental breach and the breach of a condition. He also does not explain the origins of the doctrine of fundamental terms in *Alexander* v. *Railway Executive,* but instead discusses this case at length on the meaning of "misdelivery," a point which was raised there only *obiter*. The suggestion that misdelivery, whenever the term is used in an exemption clause, should be interpreted as delivery to a wrong person by mistake, is attractive provided it is conceded that to this extent exemption from liability is possible. Yet in *Woolmer* v. *Delmer Price* it was held that an exemption clause could not operate even where there had been delivery to the wrong person by mistake.

Another matter, which might be discussed at greater length in the next edition, concerns the so-called ticket cases. The effect of these decisions is indeed set out fully and accurately, but the crucial question as to how and when a contract for carriage by railway is made is dealt with simply by stating that this contract is made by the purchase of a ticket. This cannot explain the contractual force of the words printed on tickets any more than that of conditions introduced into contracts for the purchase of other commodities by printing on the paper in which they are packed. The question, as far as the law of transport is concerned, is now largely academic, but the "unreal atmosphere" of the ticket cases has invaded the general principles of contract. No one is better equipped to restore realism in this field of law than the author of what is now the leading textbook on this subject.

J. Unger.

The Law of Stamp Duties. Second Edition. By J. G. Monroe, B.A., of the Middle Temple and Lincoln's Inn, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1956. 214 pp. 27s. 6d.]

Stamp duties have for a long time represented a part of the law of England and Scotland which few lawyers care about and even fewer take pains to understand. Today, however, the rates of duty are so high that the practitioner is forced to care, if he wishes to save his client unnecessary expense; and this fact is recognised by the Law Society, who now include compulsory questions on the stamp duties in the Solicitors' Finals Examinations.

Mr. J. G. Monroe published the first edition of his book in 1954, although the substance had already appeared as a series of articles in *The Conveyancer and Property Lawyer*. Since then there have been few major changes in the law, but in addition to recording the changes that have occurred, including those in the Finance Act, 1956, the author has revised the text, improved the arrangement of the subject-matter, and compiled an Appendix containing the principal enactments relating to stamp duty, the omission of which in the first edition had rendered the book somewhat less than self-sufficient for detailed work. The reviewer had indeed found a serious inaccuracy in the first edition. Upon turning expectantly to the corresponding page in the new edition (p. 129), thus carrying out the detective work of reviewing a book in traditional fashion, he found that not only was the inaccuracy corrected, but the whole section had been rewritten in a far more lucid manner. Further investigation reveals that this is typical of the thoroughness with which the work of revision has been carried out.

This book is a small masterpiece of legal writing. One of its most remarkable features is that the author has not simply followed the Stamp Act, 1891, through from the first section to the last, but has gone to the trouble of absorbing all the law, and has restated it as a logical and coherent entity, so far as this is possible. He has into the bargain presented a part of the law that appears to be composed entirely of unrelated details in a narrative that is both accurate and readable.

The student who approaches the topic for the first time will find the book of great use. It is, however, more than a student's textbook. While, as a work of reference, it may lack the detail of the established works, and its arrangement does not allow the reader to find the heading he wants by flicking through the pages without bothering to look at the index, it does not lack accuracy, and it always gives the answer, if the practitioner cares to look, even where the point is one upon which there is no final decision. Perhaps its best recommendation lies in the fact that it is possible, not merely to look up any particular topic and get the right answer, but to read a few pages at a time

and so grasp the whole of the law on the particular type of document with which one is dealing.

The reviewer has one complaint: the footnotes would be improved if they not only cited the important authorities, but also, where this would be helpful, summarised the facts. This is, however, a minor point. The book is one to be recommended.

D. C. Potter.

The Law of Stamp Duties (Alpe). Twenty-fourth Edition. By Peter E. Whitworth, b.a., of the Middle Temple and Lincoln's Inn, Barrister-at-Law; sometime one of H.M. Inspectors of Taxes, and James Mackenzie, of the Office of the Controller of Stamps, Inland Revenue. [London: Jordan & Sons, Ltd. 1956. 525 pp. £2 15s.]

Alpe is said to have been at some time in the past the leading authority on stamp duty. Be that as it may, recent editions of the book have not enjoyed a high reputation, largely because successive editions had done little more than add the new law in the places where there was new law, with the result that the book became unbalanced, misleading where it should have been reliable, and almost totally unreadable. Mr. Whitworth has undertaken the task of editing in a herculean spirit, and has in consequence produced a book of far greater usefulness than the previous few editions.

The advertisement on the dust cover states that the entire book has been rewritten, but this claim is not really justified and is indeed not made by Mr. Whitworth, in his preface. There has been a great amount of rearranging and rewriting, but the general plan of the book is not much changed, and much of the text seems to be similar to the text of the previous edition. It is still a work of reference for the practitioner, the topics arranged for the most part in alphabetical order as in the 1st Schedule to the Stamp Act, 1891. The text is not, and indeed does not claim to be, easily readable, and accuracy of detail has been preferred to logical exposition. The student would not be easily able to learn the subject from this book. This is not however a student's book, and for the practitioner who simply wants the answer to a particular question with the minimum of delay, the method of arrangement that has been adopted has a great deal to recommend it.

The Editor is to be congratulated for the thoroughness with which he has remodelled this book. Two criticisms are, however, respectfully offered, as much to illustrate what has been achieved as what has been overlooked. First, the author occasionally seems unwilling to draw a conclusion from the authorities, if there is any danger that it may not be beyond question. For example, if the reader, wishing to know what stamp to have impressed on a covenant to pay £10 a week for an indefinite period, turns to the page dealing with this topic—page 131— he does not find any general rule stated. What he does find is a statement that it was decided in *Clifford* v. *Commissioners* [1896] 2 Q.B. 187 that a covenant to pay £108 18s. per week for an indefinite period was held to attract stamp duty by reference to the weekly sum and not to the aggregate payments for the year; he also finds a reference to two other cases. He is obliged to draw the conclusion for himself, that these authorities lay down a general rule, and were not decided on any unusual facts. Admittedly in the example given this conclusion can be drawn with little risk of error, but the fact remains that the reader may want to be expressly reassured on this very point, without having to look up the cases for himself. The second criticism is that the layout, following the Act, leaves some important topics spread piecemeal about the book. For example, in order to ascertain the rule

as to the stamping of a special power of appointment, the reader may have to look at pages 104, 151 to 156, 187 and 330, and in none of these places is the whole law on the topic set out, the reason being that there is no one place in the Act where the topic is entirely disposed of.

These criticisms are, however, of comparatively minor importance. The fact remains that *Alpe* is once more a reliable book.

D. C. Potter.

Calendar of the Caernarvonshire Quarter Sessions Records. Vol. I, 1541–1558. Edited by W. Ogwen Williams, County Archivist. With a foreword by The Rt. Hon. Lord Justice Morris, p.c., c.b.e., m.c., ll.d., d.l. [Caernarvonshire Historical Society, on behalf of the Caernarvonshire Joint Records Committee of Quarter Sessions and County Council. 1956. cix and 385 pp. 20s.]

H.M. Lieutenant and Custos Rotulorum of the County of Caernarvon states in a preface to this elaborately learned work that it is the first of a series of volumes by means of which it is hoped to make the contents of the county's unusually full and interesting quarter sessions records available. Such early quarter sessions records as are covered by this volume are not matched by those of any other Welsh county and only one English county has earlier records. The author of the foreword is surely right in thinking that deep interest in these records will be taken by all who have interest in the history of Caernarvonshire. But the interest of this volume is far more than local, or even national; it is of importance to all who are interested in the history of the common law and its institutions. We are told that this project would not have been embarked upon but for the more than generous grant to meet the cost of publication made by the County Council from their Welsh Church Funds. It is good to see these funds being applied to such a worthy and, in view of their origin, such an appropriate purpose.

The editor's long introduction is an original contribution to scholarship. He has much to tell us about the legal and social history of sixteenth-century Wales and the history of the common law in Wales. The part of the volume headed Text consists of transcriptions (together with translations) from the Indictment Roll, Sessions Files, Recognizance Rolls, and Recognizance Books. There are also notes on some of the Justices of the Peace and on some of the cases transferred from quarter sessions to be tried in the Great Sessions. In most publications of sessions and similar records the index of persons is substantial. In the present instance it covers 114 pages, every one of which will, no doubt, be eagerly traced by genealogists on the scent. Of more interest to the legal historian are the 46 pages of the index of places and subjects.

A particularly useful feature of this index—which is by no means always found in the various publications of English quarter sessions records—is the heading "Offences" which indexes the substance of the records from "affrays" to "wounding." So often the editors of local legal records who are not lawyers are unable or unwilling (the present editor is neither) to assist in this way the reader who is interested primarily in the substantive law. "Extortion" appears in the list of offences and it seems that quarter sessions not only had no difficulty in recognising extortion *colore officii* as a crime (*e.g.*, pp. 138 (58) and 149 (87)) but also had no difficulty in recognising extortion (*e.g.*, pp. 35 (7) ("*extorcive . . . cepit . . . decem denarios*") and 62 (66) ("extortiously and unlawfully took and received several sums of money, namely, . . .)). This is interesting, as the superior courts and the writers on the later common law did not regard extortion as a crime unless it amounted to robbery or something like it, so that this defect in the common law had to be remedied by the various

statutory blackmail offences. Yet the extortioner makes an early appearance among the criminal characters of most communities.

W. H. D. Winder.

Law Relating to Hospitals and Kindred Institutions. Third Edition. By S. R. Speller, ll.b. [London: H. K. Lewis & Co. 1956. xi and 650 pp. £3 10s.]

The author is the Director of Education of the Institute of Hospital Administrators, and this book, now in its third edition, has been written with the needs of students of hospital administration in mind. The subject-matter, which is considerable, falls largely into two parts; administrative matters peculiar to hospitals, and legal principles, whose application to hospitals presents no particular difficulties.

The practising lawyer will find the sections devoted to the organisation of the health services well worth study. These sections are well written, and contain much general information which is becoming increasingly important as the number of actions against hospital authorities grows. The reprinted statutes and statutory instruments, to be found at the end of the book, are also of value.

In what is primarily a textbook for future hospital administrators it is inevitable that the treatment of certain legal problems is brief. But the chapters on trustees and the Charity Commissioners are lucid, and the author emerges with credit from his tussle with the liability of an occupier of dangerous premises. He does not, however, draw a distinction between liability for the state of the premises and liability for things done on the premises, except, of course, in so far as he discusses the special duties owed by medical staffs to patients. The special considerations applying to children on dangerous premises might be more conveniently set out by treating children as forming a class distinct from invitees and licensees. The discussion of liability for negligence is reasonably full, save for the omission of any reference to the doctrine of *res ipsa loquitur*.

This is an authoritative textbook which may be confidently recommended not only to the student of hospital administration, but also to a wider public.

Allister Lonsdale.

Eigendomsverkrijging Bij Koop Van Roerende Goederen in het Westeuropees Internationaal Privaatrecht. By J. C. Schultsz. ['s Gravenhage: Martinus Nijhoff; agents in the British Commonwealth, B. T. Batsford, Ltd. 1955. 340 pp.]

This book represents the fruits of the author's studies for his Doctor Juris at the Municipal University of Amsterdam. The amplitude of the bibliography and the extended visits to both Paris and Oxford to gather the material are apt to take away a reviewer's breath. Were it not for the appearance in the course of the last year of two books in the English language of considerable excellence by Messrs. Lalive (reviewed at 19 M.L.R. 327 by Dr. Mann) and Zaphiroiou on The Transfer of Chattels in the *Conflict of Laws*, this present book would be greeted with avidity. As it is, written in the Dutch language with brief summaries in French and English, the work as far as an English reader is concerned is likely to be consigned to limbo. In saying so the reviewer is conscious that an unwarranted injustice is being committed. Yet the style in which the subject has been presented will serve to maintain this work as a leading book on this subject, for it is essentially a reference book and not a monograph as Lalive's or Zaphiroiou's.

The introduction to the main part of the book describes the 1951 Draft Convention at The Hague on the Sale of Movables and the law applicable to the distinction between movables and immovables. The author avowedly seeks only to illuminate the dark passages of the subject relating to the transfer of ownership upon which delegates to the Hague Conference failed to reach agreement and which has been referred to an international committee appointed by the Dutch Government. The book proceeds to deal in two parts with the transfer of property (a) by the owner and (b) by persons other than the owner. The comparative study by the author of the main European laws, *viz.*, Dutch German, French and English and to a lesser extent Swiss, Spanish, Austrian and Italian is well handled, the various laws being neatly correlated. To one unversed in anything but the rudiments of continental systems of law the statements appear quite unexceptionable even though here and there some sacrifice of lucidity of style is experienced.

It is over the question of style that this reviewer feels he must express annoyance even at the expense of the charge that he is cavilling. References to sources may be legitimately and ruthlessly excised, particularly where the bibliography is so ample. Footnotes may, on the other hand, in conformity with modern American practice be removed to the end of the indices, but must a reader suffer the torture of a welter of references in the body of the text? Sometimes the references are overwhelming to the point of revulsion. Let one example suffice; at pp. 3–4 there appears the following:—

> Over de Zesde en Zevende Zitting van de Haagse Conferentie raadplegemen in de eerste plaats de Actes et Documents, gepubliceerd in telkens twee delen door Landsdrukkerij te Den Haag in de jaren 1928 en 1952. Het ontwerp-1931 met rapport-Juillot de la Moradière, verder te noemen rapport-1931, is te vinden: Documents-1951, p. 4 e.v. Van de literatuur gepubliceerd vóór de Zevende Zitting noemen wij: Bagge, Recueil 1928, deel 5, p. 127 e.v.; Paschoud, *op. cit.*; Rabel, *The Conflict of Laws*, a comparative study, deel 3 (1950), p. 51 e.v.; Gutzwiller-Niederer, Beiträge zum Haager Internationalprivatrecht 1951 (1951), door Gutzwiller.
>
> Over de Zevende Zitting schreven o.a.: Offerhaus, W.P.N.R. 4248–4251 (1952), voor de koop zie W.P.N.R. 4248; vgl. ook Offerhaus, Clunet 1952, p. 1070 e.v., voor de koop p. 1076 e.v.; Dölle, Rabels Z. 1952, p. 161 e.v.; Gutzwiller, Annuaire suisse de droit international 1951, p. 149 e.v.

Apart from this major criticism there is little to find fault with in the way of substantive matter. The author is, however, somewhat vague when he declares (pp. 74–75) that "the domiciliary law of the vendor as the appropriate law on the prerequisites of the transfer of property has lost its absolute power." On English law the reader may find it odd to be told (at p. 76) that "the English delegation at the Hague Conference of 1951 has taken up a position tending towards the autonomy of the parties." At p. 92 Rules 5 (1) and (2) of section 18 of the Sale of Goods Act, 1893, are repeated having been set out on p. 85. In dealing with the rights of the unpaid seller under section 43 the words in subsection (1) "or right of retention" are missing and there is no explanation to the effect that the reference to "custodier" is to the Scottish law of bailment. At p. 144 "De goederen *zijn* in transit, zo zegt s. 45 (1) S.G.A. . . ." does not accurately translate section 45 (1). At p. 176 the reference to "Dunstan, *The Law Relating to Hire Purchase*" is odd. The most common textbooks cited are Earengay and Proudfoot & Jones.

All told, Dr. Schultsz is to be warmly congratulated on the completion of a mammoth piece of research which goes a long way towards providing a basis for a multilateral convention on this subject. No higher compliment could be paid than for this reviewer to suggest that Dr. Schultsz might have written his book in French or English particularly since he appears to have sufficient command of both languages.

L. J. Blom-Cooper.

Die Vertragsverletzung im englischen und schweizerischen Privatrecht. By Bernhard Staehelin, dr.jur., Privatdozent an der Universitaet Basel. Basler Studien zur Rechtswissenschaft: Heft 41. [Helbing & Lichtenhahn, Basel. 1954. x und 331 pp. Sw.Fr. 23.75.]

The author has set out to present the principles of Swiss and English law concerning breach of contract, taking these two legal systems as representative of the Continental and Anglo-American families of laws. His purpose is to practise "comparative jurisprudence." He disclaims specifically the intention to contribute to the doctrines of Swiss or English law on the subject of breach of contract or to offer his own solutions of particular questions. He begins with a very full account of the general principles of contract and his work provides a useful and readable survey contrasting the English and Swiss rules on a subject of considerable complexity. His careful and stimulating way of treating this practically and theoretically equally important subject deserves to be praised.

But one is entitled to expect more than industry and accuracy from a *Habilitationsschrift*. It should advance legal science by original work. The author, however, follows familiar lines even though they may have become of doubtful validity. Yet he enjoyed the considerable advantage of being able to use the outstanding book of Max Rheinstein, dating from 1932, on *The Structure of Contractual Obligations in Anglo-American Law*.

The history of contract occupies the first 159 pages. Then follow, up to page 234, general principles of contract, consisting partly of translated passages from current English textbooks and the text of Swiss legislation. Thus there remain only 70 pages, out of a total of 328, for the proper subject of the book, the law as to breach of contract, and even here there is no comparison in the true sense, but only a summary account of the provisions of the two legal systems which does not attain the standard of modern textbooks, such as the last edition of Enneccerus-Lehmann's *Schuldrecht* or of Arwed Blomeyer.

The survey of the development of contract on the Continent differs very little from that found in many Continental theses. There is no reference to the works of Fritz Schulz, Joers-Kunkel, Kaser or Arangio-Ruiz. The account of the history of the English law of contract fails to mention Blackstone or Maitland, let alone the subtle analysis of Pringsheim or of Andreas B. Schwarz on the relation of English to Roman law. Only secondary sources are used and no effort is made to emphasise the problems which mark the turning points in the history of contract.

It is not surprising to find the author repeating the familiar oversimplification which equates Continental law with codified law and English law with judge-made law in order to proclaim the superior virtues of case law, particularly its flexibility. In truth, as so many English comparative lawyers too have come to recognise, Continental laws are also made by the judges, who have to reinterpret the codes in the light of the changing demands of social justice. It is regrettable that Staehelin has not considered the instructive work of his countryman Mayer-Hayoz on *The Judge as Legislator* or the lucid books of Josef Esser or R. Goldschmidt. These writers have emphasised convincingly that also the Continental law is governed by the self-responsible process of judicial creation of norms. A comparison of the results of judicial Aequitas based on section 242 of the German Civil Code with the fruits of the worship of precedent under the frozen system of Equity must prompt the question whether English case law is really more adaptable than a codified law.

The function of the judge in relation to modern laws of contract has changed. He may start from the terms agreed by the parties, but he can now interpret them so as to create rights and duties which cannot be reconciled

even with the presumed intention of the parties at the time of contracting. The modern law of contract cannot be understood only in terms of the autonomy of the parties. The parties must be prepared to respect those principles which are essential for the functioning of the legal and economic order under which they are conducting their affairs.

These considerations also explain the limits of the right to claim damages. It is a question of the just distribution of risk and the incidence of liability. These ideas, described by Savatier in his *Metamorphoses* as "*socialisation du risque,*" may lead to an enlargement of the circle of those whose interests are affected so as to include outsiders in addition to the contracting parties. This development has been anticipated in English law by the doctrine of undisclosed agency which is derived from the requirement of consideration for a contract, and in continental law in the problems of the *Liquidation des Drittschadens* or *l'action directe.*

W. Müller-Freienfels.

Principles of South African Law. Fourth Edition. By G. Wille, ll.d. [Cape Town: Juta & Co., Ltd. 1956. £3 6s.]

Landlord and Tenant in South Africa. Fifth Edition. By G. Wille, ll.d. [Cape Town: Juta & Co., Ltd. 1956. £3 3s.]

The Law of Agency in South Africa. By (Judge President) J. E. de Villiers, m.a., b.c.l. and J. C. Macintosh, b.a., ll.b. Second Edition. By D. B. Knight, b.a. [Cape Town: Juta & Co., Ltd. 1956. £4 15s. 6d.]

Judicial Interpretations of the South African Criminal Procedure Acts (1915–1955). By (Ex-Judge President) C. W. H. Lansdown, b.a., ll.d. and E. F. Van der Riet, b.a., assisted by G. N. Dock, m.a. [Cape Town: Juta & Co., Ltd. 1956. £4 15s. 6d.]

Three of these four books are new editions of existing works. Together they bear witness to the high standard of legal authorship in South Africa and the great merits of the publishers, who print legal treatises in clear type with varied but attractive layouts and agreeable bindings. With a restricted market prices are inevitably high.

Dr. Wille's *Principles of South African Law* is the fourth edition of a standard students' textbook first published in 1937. Its merit has always been that it contained a great deal of information in a small compass arranged so that the matters of importance in the modern law are thrown into relief while the historical development is relegated to a subordinate place. The Wills and Matrimonial Affairs Acts of 1953 have been skilfully incorporated in the text which is broken by numerous sub-headings, a device of exposition which Dr. Wille handles exceptionally well.

The same author's *Landlord and Tenant* is now nearing its half-century and the present edition maintains the standard of its predecessors. It covers a good deal of ground, for it mentions in some detail the obscure history of leases in Holland in the sixteenth and seventeenth centuries and also deals with the whole of the modern law including the Rent Act. It might be useful to add a table of statutes in a subsequent edition.

Probably the most scholarly of the works under review is de Villiers and Macintosh on *Agency*, a book which has been excellently edited by Mr. Knight. This considers in detail and with copious illustrations from the cases a whole range of problems in the law of agency not all of which are mentioned in the English books, and usually has something sound and stimulating to say on them.

It is to be commended to the attention of both the academic lawyer and the practitioner: the South African law of agency runs parallel to the English most of the way. Finally, a new book by Judge Lansdown, the leading South African authority on criminal law, needs no commendation from the reviewer. With his co-author and assistant he has set out the various criminal procedure Acts together with the cases decided under the different sections in a way which will make it a great deal easier for a criminal lawyer to find his way about this intricate but important subject.

A. M. Honoré.

The Public Control of Land. By J. F. Garner, ll.m., Solicitor. [London: Sweet & Maxwell, Ltd. 1956. xxiii and 196 and (index) 8 pp. 35s. net.]

This is an ambitious little book; and most lawyers could read it with profit. Mr. Garner, as appears from his preface, is very conscious of "the importance for lawyers to assimilate the law of their generation into the general jurisdiction of the common law"; and his object in this book is to provide a guide to, and also a related discussion of, the various ways in which local authorities, central government departments and other bodies may, by the exercise of statutory powers conferred on them in connection with their functions, interfere with the private ownership of land.

The matters which Mr. Garner discusses are of very great practical importance. The landowner and his legal advisers are vitally interested in any possible interference with rights of property. For what purposes can land be compulsorily acquired, requisitioned or compulsorily subjected to wayleaves, etc.? What uses of land are subject to control by licensing or registration or by the enforcement of by-laws or standards? The short answer to these questions is to be found in Mr. Garner's concise and lively discussions of town and country planning, building controls, housing, highways, sea and rivers, public health and the powers of interference with private landowners available to the central government departments, public utility undertakings and public corporations.

This book is an accomplished example of the art of compression; and it is not surprising that, in places, the treatment is rather thin. Nevertheless it should prove very useful, if only as a ready and accessible catalogue of matters in which many practitioners and teachers of law are surprisingly unlearned. The reason for this lack of learning is simply that, until very recently, students at the universities have had to pay little or no attention to these matters. Land law has been taught in the traditional manner with little regard for the real situation of the landowner; and the result is that, even after some years of practice, a practitioner may well have an excellent general grasp of the principles of the Settled Land Act but no real general understanding of planning or compulsory purchase. For such a practitioner this new book will be particularly valuable; and it should be generally useful as a convenient reference book for use on those occasions when there is no time to refer to the full standard works on any of the various matters here discussed.

Leolin Price.

Reports of International Arbitral Awards, Vol. VI, 1956. [United Nations Publication (1955.V.3). xiii and 408 pp. 28s. net.]

The sixth volume in this most valuable and systematic collection of the decisions of arbitral tribunals embraces the decisions of the U.S.-G.B. arbitral tribunal constituted in 1910, of the Tripartite Claims Commission (U.S., Austria and

Hungary) constituted in 1924, and of the General Claims Commission (U.S.-Panama) constituted in 1926.

As with the previous two volumes, each award is captioned under the name of the individual claimant, and a head-note is used in the manner of English law reports. This, together with a thorough index and the very useful bibliographical notes relating to particular tribunals and particular cases, makes the volume a welcome addition to an indispensable series.

D. W. Bowett.

Books and Publications Received

Late Sittings. By A. Laurence Polak, b.a. (Hons. Classics), Lond. A Solicitor of the Supreme Court. Illustrated by Leslie Starke. [Published by Justice of the Peace, Ltd., Little London, Chichester, Sussex. 1956. ix and 107 pp. 9s. 6d. net.]

Motor Claims Cases. Suppt. to Third Edition. By Leonard Bingham. [London: Butterworth & Co. (Publishers), Ltd. 1956. xii and 92 pp. 12s. 6d. net. Complete work 55s. net.]

Archbold's Criminal Pleading, Evidence and Practice. Thirty-third Edition. Tenth Cumulative Supplement and Supplemental Service Issue No. 10. December 1, 1956. Edited by T. R. Fitzwalter Butler and Marston Garsia. [London: Sweet & Maxwell, Ltd. 1957.]

International Political Science Abstracts. Vol. VI, No. 3, 1956. Abstracts of Articles published from April to June, 1956. Prepared by the International Political Science Association in co-operation with the International Committee for Social Sciences Documentation and with the support of Unesco. [Oxford: Basil Blackwell. 1956. 12s. net.]

Bulletin of the International Commission of Jurists, No. 6. December, 1956. 61 pp. 47, Buitenhof, The Hague, Netherlands.

Report of International Law Conference. Held at Niblett Hall, June, 1956. The David Davies Memorial Institute of International Studies. 76 pp. 4s. net. Thorney House, Smith Square, London, S.W.1.

The Code of Criminal Procedure (V of 1898). Fifth Edition. Vol. 4. Sections 439–550. By V. V. Chitaley and S. Appu Rao. Assisted by D. V. Chitaley. [Nagpur: A. I. R., Ltd. 1956.]